IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff,	
Versus	No. CR-06-113-EFS
	December 9, 2016
	Spokane, Washington
ANTHONY BURKE, Defendant.	Pages 1 - 225

TRANSCRIPT OF PROCEEDINGS

COMPETENCY HEARING

BEFORE THE HONORABLE EDWARD F. SHEA

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Proceedings recorded by mechanical stenography, transcript produced by computer.

FRIDAY, DECEMBER 9, 2016 - 9:22 a.m.

(Whereupon Court reconvened
in the courtroom at 9:22 a.m.)

THE COURT: Good morning at all of you. Please be seated. Let's get started.

THE DEPUTY CLERK: Matter before the Court is United States of America versus Anthony Burke.

Cause number CR-06-113-EFS.

Time set for competency hearing.

09:22AM Counsel, please state your presence for the record.

MS. VAN MARTER: Stephanie Van Marter on behalf of the United States, assisted by Mr. Ohms as co-counsel.

MR. SCHWEDA: Pete Schweda on behalf of Mr. Burke. Who's present.

THE COURT: Counsel, good morning. Mr. Burke, good morning.

Just to begin, nothing serious, just a little growth that had to be removed. But the bandage is much worse than, actually, I feel. So I hope you're relieved that I'm not in any

09:22AM serious condition, no pain, no medication, ready to go.

All right, with that set aside, I feel like the precedent that I have to disclose any illnesses I have to, to those gathered in the courtroom.

With that said, I'm ready to proceed. Okay.

MS. VAN MARTER: Yes, Your Honor.

THE COURT: Miss Van Marter.

MS. VAN MARTER: The United States would call Doctor Low.

THE COURT: Okay. Doctor Low.

The witness stand is right over here.

WHEREUPON,

CYNTHIA LOW

having been first duly sworn

testified as follows:

THE COURT: Please be seated. And when you're comfortable, please tell us your first and last name and spell them both for the record.

THE WITNESS: Cynthia Low. C Y N T H I A. Low. L O W.

THE COURT: Do you prefer Doctor?

THE WITNESS: That would be fine.

THE COURT: Okay. Doctor Low.

09:23AM

DIRECT EXAMINATION

BY MS. VAN MARTER:

Q. Good morning, Doctor.

A. Good morning.

Q. **How are you currently employed?**
A. **I'm a forensic psychologist at the Federal Detention Center in Sea-Tac, Washington.**
Q. **And how long have you been a forensic psychologist with the BOP?**
A. **Since 2001.**
Q. **Let's take a minute to talk about your educational background, please.**
A. **Yes.**

09:24AM **I have a bachelors degree in psychology from the University of California at Davis, granted in 1992.**

A masters of science in clinical psychology from St. Louis University, granted in 1995.

A Ph.D. in clinical psychology, also from St. Louis University, granted in 1997.

And I've been licensed in Washington as a psychologist since '99.

Q. **And if you could tell the Court the relevant experiences you've had prior to becoming a forensic psychologist at BOP.**

09:24AM A. **Yes.**

I actually completed an internship at Western State Hospital in Tacoma, Washington, back in 1996. And I did a forensic rotation then.

When I secured my forensic position in the Bureau of Prisons, I received special training within the agency.

And from then on, I have consulted as an, as necessary, with other forensic psychologists in the agency.

And, of course, I make sure that I get my continuing education in the field yearly.

Q. **And what is your continuing education requirements?**

A. **In the State of Washington we have to have 60 units every three years.**

Q. **And what are your current duties and responsibilities then with the BOP?**

09:25AM A. **I mainly conduct court-ordered evaluations, nationwide. Mainly for competency to stand trial, as well as for insanity at the time of the alleged offenses.**

I generate reports for the Courts and I testify as needed.

Q. **And in your position with the BOP, are you considered then a neutral evaluator?**

A. **I am.**

Q. **And what does that mean?**

A. **It means that I am not working for either side. I'm not** 09:25AM **working for the prosecutor, I'm not working for the defense attorney, I'm simply trying to answer the questions that the Courts have posed.**

Q. **Okay.**

THE COURT: Doctor Low, feel comfortable just to talk to Mr. Miss Van Marter. I know that that, I've had you testify

in my court before, so.

THE WITNESS: Thank you.

THE COURT: But whatever, just do whatever you feel natural doing, so.

THE WITNESS: Thank you, sir.

BY MS. VAN MARTER:

Q. And, approximately, how many evaluations have you done in your career?

A. I'm just roughly guessing a few hundred. I don't really keep track of that.

Q. And do you know specifically to competency?

A. I don't.

Again, the bulk of our evaluations are in competency though, rather than insanity.

Q. And during your time as a forensic psychologist, have you ever been in a circumstance where you have found somebody incompetent to proceed to criminal trial?

A. Certainly.

Q. And do you know a percentage of how many of your overall competency evaluations?

A. I would say approximately 15 percent or so.

Q. And in conducting your evaluations, do you ever consult with your peers, when needed?

A. I do.

If I have a particular, particularly complex case I

will do so.
Q. And in this particular case, did you consult with any of your peers regarding the evaluation of Mr. Burke?
A. No, I didn't feel a need to do that.
Q. And why not?
A. It just wasn't a particularly complex case.
Q. Was your report with respect to Mr. Burke reviewed by anyone, however?
A. It was reviewed by my chief psychologist, which is part of our policy.
09:27AM
Q. A part of procedure?
A. Yes.
Q. Okay.
And I know Judge Shea just referenced this, but you've, obviously, previously testified in Federal Court; is that correct?
A. I have.
Q. And how many times have you been qualified as an expert?
A. I think about 65 as of now.
09:27AM
Q. And specifically in the area of competency?
A. Yes.
Q. And just generally, for the record, in this particular case, were you tasked with doing a competency evaluation of Mr. Burke?
A. Yes, I was.

Q. **And what is the purpose of the competency evaluation?**
A. **Well, the purpose, as laid forth in the court order, was to determine whether or not he suffered from a mental disease or defect, rendering him mentally incompetent, to the extent that he's either unable to understand the nature and charges against him, or to assist in his defense.**
Q. **All right.**
MS. VAN MARTER: Your Honor, at this time, I would like to approach the witness and present government's proposed exhibit number 1, which is Doctor Low's evaluation.
We do have, marked as government's 2, her curriculum vitae that's already been provided to the Court, just for the record, in terms of her background. May I --
THE COURT: And counsel as well?
MS. VAN MARTER: And to counsel as well. May I approach.
THE COURT: You may.
(Handing exhibit to witness.)
THE COURT: Mr. Schweda, you had her CV, is that correct, and you read her report?
MR. SCHWEDA: I don't have her CV. I do have her report, Your Honor.
THE COURT: Okay.
Do you have any questions about whether she's an expert?

09:28AM
09:28AM

MR. SCHWEDA: No, Your Honor.
THE COURT: Okay.
MS. VAN MARTER: And, Your Honor, we did previously send that curriculum vitae.
I do have an extra copy, I will give that to Mr. Schweda.
THE COURT: Thank you.
For the record, Doctor Low is qualified as an expert on the issue of competence to testify today.
09:29AM BY MS. VAN MARTER:
Q. And, Doctor Low, you recognize what has been handed you as government's proposed 1 and 2?
A. Yes, I do.
Q. And how do you recognize them, just for the record?
A. Well, one is my vitae and one is the report that I generated for this case.
MS. VAN MARTER: Your Honor, United States would move to admit government's 1.
THE COURT: For the record, actually, 1 is your report
09:29AM and 2 is your vitae, right?
THE WITNESS: I'm sorry. Yes. Yes.
MS. VAN MARTER: Thank you.
The United States would move to admit, Your Honor.
MR. SCHWEDA: Your Honor, if I may, we, I would ask that they be published under seal at this time, until the Court

has had an opportunity to determine whether they should be unsealed.

THE COURT: The testimony's taken in open court, and I'll, I'll permit the seal only on a temporary basis.

The report itself is in evidence and I'm not persuaded at this time, as you know, Mr. Schweda, that it should remain under seal, but her testimony is certainly open and she can refer to her report on a repeated basis, as necessary, under the questioning by both Miss Van Marter and yourself.

09:30AM And so I'll permit it to remain under seal, until I make a decision on the motion to disclose to Snohomish County and Western State Hospital. Thank you.

MR. SCHWEDA: Okay.

MS. VAN MARTER: Thank you, Your Honor.

THE COURT: Thank you.

BY MS. VAN MARTER:

Q. Doctor Low, with respect to Mr. Burke and this particular evaluation, I just, I wanted to just cover the time period first.

09:30AM When did he first come to the facility for purposes of your evaluation?

A. He arrived on May 26th, 2016.

Q. And how long was he there?

A. I'm not sure exactly when he left, but my last meeting with him was July 6 of 2016.

Q. **And approximately how many times did you meet specifically with Mr. Burke during that time period?**

A. **I met with him for nine times for the interviewing and that lasted for approximately seven hours total.**

Q. **Okay.**

Let's talk a little bit about your report and specifically some of the sections in your report before we get to your conclusions.

There is a section within this report that refers to, 09:31AM **on page two, background information, according to the defendant.**

THE COURT: Excuse me, counsel, I need to ask a question.

MS. VAN MARTER: Yes.

THE COURT: You say you met with Mr. Burke nine times over seven hours.

Was that by choice, is that something that you do normally, rather than a long session, is that to determine his behavior over different times at different dates?

THE WITNESS: That is exactly one of the reasons why 09:31AM **we do that.**

First of all, we have 30 days to work with a person. I don't like to tire them out, I don't like to tire myself out, doing a very long session.

I like to see them over multiple points in time, to see how they present over multiple points in time, yes.

THE COURT: Okay. Thank you.

BY MS. VAN MARTER:

Q. **And I'll follow the Court's question with that a little bit out of order, but do you also take into account the observations of other staff members of the facility?**

A. **Oh, yes.**

Q. **And why is that?**

A. **Well, often times -- well, I wouldn't say often times -- sometimes people may present very differently in my office, in front of me, than they might to other staff, the correctional officers, who might have them for a whole eight-hour period, medical staff, other people like that. So it's very valuable to obtain these other observations.**

Q. **And did you do that in this particular case?**

A. **Yes.**

Q. **Okay.**

So let's talk about that background information according to the defendant.

What is the purpose of that section within your report? And starting on page two.

A. **Yes.**

Typically, I like to have the defendant, basically, tell me their life story. I want to hear it straight from the horse's mouth in other words and be able to gather that.

It's their opportunity to tell me about themselves, in

various capacities, in terms of their family upbringing, mental illness, substance abuse criminal history, that sort of thing.

Q. And why is that?

A. It's just part of the history gathering. And it also gives me an indication, too, of how credible or how reliable a reporter they may be.

Q. And you have had contact with Mr. Burke in the past; is that correct?

A. Yes, I have.

09:33AM Q. And when was that?

A. Back in 2007 he was actually sent to our facility for a different kind of court-ordered evaluation and I saw him then.

Q. And what was the purpose of that previous court-ordered evaluation?

A. That one was to determine whether or not he was suffering from mental disease or defect in which he might need inpatient hospitalization.

Q. And you note that prior contact in this evaluation?

A. I'm sorry?

09:33AM Q. You note that prior contact in this evaluation?

A. Yes, I did.

Q. And why did you do that?

A. Well, because I had obtained a vast amount of information back then, I did not want to be repetitive.

So I noted that for history sake and also wanted to

focus, basically, on things that had happened since our last evaluation.

Q. And for the record, here, your evaluation and the competency evaluation that you conducted with Mr. Burke, did you rely on, in any way, on your previous evaluation results?

A. I didn't rely on it, per se. Again, it was more historical data.

Q. And so is this evaluation based upon all of the things that you did, as noted in this recent report, as admitted as government's number 1?

09:34AM

A. Yes.

Q. And with respect to the historical or background information, that was provided by Mr. Burke, was he able to do that?

A. Yes, he was able to provide a good amount of information, a good amount of detail.

He did claim some difficulties remembering dates of certain occurrences, but aside from that, there really weren't any problems that I saw.

09:34AM

Q. And was there anything significant to you as the evaluator as he was recounting his historical background?

A. Yes.

When we approached the time frame of about 2013, in which he had reported absconding from, I believe, a halfway house and coming over to Western Washington from Eastern

Washington, he declined to discuss the events around that period.

And when I asked him if he was referring to the arrest for a murder charge, he acknowledged that that was what he did not want to talk about.

Q. And just so that we're clear on the record, are you referring to page five, the top paragraph of government's exhibit number 1?

A. Yes.

09:35AM Q. And why was that particular statement from Mr. Burke significant to you?

A. I thought it indicated a very good sense of judgment and logic to not discuss something that could possibly incriminate him.

Q. And aside from those statements, you had indicated that he at times had difficulty remembering dates and things.

Did you find that there was any contradiction in terms of his memory?

A. Yes.

09:36AM Q. For instance, specifically referencing his prior contact with you.

A. Yes.

Q. And in what regard, if you could?

A. Well, the first day I met him and screened him, I reminded him that he had been in our place in 2007 and that I had met

with him.

And he said that he didn't really remember it all too well.

But then later on, during that same meeting, he spontaneously referenced the report that I wrote, as well as the diagnosis, one of the diagnosis that I had given him, of autism.

And then further, more near the end of that same meeting, when I had advised him that he was going to be housed in the segregation unit, because of this escape attempt from Western State Hospital, he then spontaneously told me, well, back in 2007 I was also put up there for an escape, but you were the one who cleared me, so that I could come out into the general population.

Q. And did that appear to be consistent with some of his indications regarding his memory?

A. It showed me that he really had pretty good memory and was trying to convey that he did not.

Q. And I know we're going to touch upon some of the other statements in that historical area later on, but let's move on to the next section of your evaluation.

The information from supplemental sources.

What other information did you review, aside from your meetings with Mr. Burke, as well as the information provided to you by the staff at BOP?

A. I had a lot of records to review.

09:37AM

09:37AM

There were several records, legal records, discovery records, and there were voluminous records from Western State Hospital.

Q. **And with respect to -- and all of those records are noted on pages seven through, through to page 21 of your report; is that correct?**

A. **Yes.**

Q. **And I want to ask you a few questions specific to some of the records, at least the more recent records that were of**

09:38AM **significance to you from Western State Hospital.**

If we could go all the way to page, page 15 of your report.

There's a several notations from records through the state, the Snohomish County state court proceedings, regarding the competency restoration of Mr. Burke, during the state court proceedings.

Do you recall that section?

A. **Yes.**

Q. **And there's a particular statement in the second paragraph**

09:39AM **that you put in quotes, regarding statements made by Mr. Burke in court.**

Why was -- if you could please read, in the second paragraph, the quote that you included within your evaluation from Mr. Burke.

A. **Yes.**

This was referring to after his murder charge was dismissed and he was civilly committed for 180 days.

Mr. Burke was upset and he stated, "I thought this was all over and I would go home."

Q. **And why was that significant to you to include?**

A. **I think it shows his line of thinking, in that he believed that he would simply be able to, to go home and resume his life, even after such a severe charge had been dismissed.**

Q. **Okay.**

09:40AM **THE COURT: Just for the record, you're referring to notes in a record from Western State Hospital, correct?**

THE WITNESS: Yes.

THE COURT: Thank you.

BY MS. VAN MARTER:

Q. **If we could go to page 16, Doctor Low.**

And you were able to review the note, chart notes from Western State Hospital of a Doctor Gallagher; is that correct?

A. **Yes.**

Q. **And who is Doctor Gallagher, to the best of your**

09:41AM **understanding, from the Western State Hospital records?**

A. **Yes.**

I believe she's a forensic psychologist there, because she was conducting a forensic risk assessment of Mr. Burke at the time.

Q. **Okay.**

And in the second paragraph, there's some recommendations by Doctor Gallagher that you note specifically.

And what, of significance, were those recommendations to you and why were they included in your evaluation?

A. **Yes.**

Doctor Gallagher noted that Mr. Burke presented very differently within a time frame of like 35 minutes.

And she thus recommended that he be tested for malingering.

09:41AM **She noted that, in the first part of talking with him, he was logical, coherent, asked questions without any problems.**

But as soon as she began to address the actual risk assessment issues, he would say, I don't know, I don't remember. Again, just act much more differently than he had just prior to that.

Q. **And you have -- we'll discuss this in more detail with respect to your report -- but there's a statement regarding exaggerating symptoms.**

A. **Yes.**

09:42AM Q. **And what does that mean to you, in terms of your role in this evaluation and why was it significant?**

A. **Yeah.**

The term of exaggerating symptoms basically means that a person is trying to present themselves as functioning much worse than they are.

They're trying to say that their symptoms are much worse than they actually are.

Q. There's a, on page 17, the third paragraph down, or second full paragraph, there's another quote in there, regarding information you received from Western State Hospital and Mr. Burke's interaction with a social worker.

Are you there?

A. Yes.

Q. All right.

09:42AM MR. SCHWEDA: I'm sorry, what page?

MS. VAN MARTER: Page 17.

The second full paragraph or third paragraph down the page.

BY MS. VAN MARTER:

Q. And you quote from the records.

And what is that quote on the second line there?

A. Second line, he told an social worker, "I wasn't planning on talking to you, but realized you may be useful to me."

Q. And why was that significant for you, with respect to the

09:43AM review of these records and including it in your evaluation?

A. Again, to me, that reflects a little bit more evidence of an antisocial personality disorder.

Somebody who is looking at people as more of a means to an end.

Q. And with respect to that same social worker, lower down in

that paragraph, as well as the last paragraph on page 17, the social worker noted particular subject areas that Mr. Burke was interested in. And you included that in your evaluation.

What were those areas and why did you include it?

A. Yes.

He asked her about how to quash warrants, how to petition, that he should be absolved of different historical charges or responsibilities for certain probation requirements.

So he was asking some pretty sophisticated legal questions, which I thought was noteworthy.

Q. And, again, in this time period, this is after Mr. Burke was civilly committed in state court, but prior to his escape that in part we are here today; is that correct?

A. Yes.

Q. And so this actual time period, with respect to these records and notes, to the best of your knowledge, they have not, this, these evaluations have not actually been litigated before state court either at this time.

A. Correct.

Q. If we could turn to page 18. Let's see, one two, three, four, fourth full paragraph, relative to chart notes, specific to January 25th of 2016 in your evaluation.

Again, on January 28, towards the bottom of that paragraph, 2016, on page 18 of your evaluation.

There's, again, some questions that are quoted by you

attributed to Mr. Burke.

Is that correct?

A. Yes.

Q. And, again, what are those questions and why is that significant to you?

A. Yes.

He asked, he asked if murder charges, basically, would be refiled, how many times they would be refiled.

And, again, that was significant to me, because it shows that he was aware that these charges were still floating around out there, so to speak, and could be refiled again.

Q. And in the last paragraph there, February 12, 2016, records from Western State Hospital. There's a series of information there.

What is reported there, in summary, and why was it significant to you to include in your evaluation?

A. Yes.

I thought this was very interesting information. He was talking to a psychologist, he was asserting that he was well enough mentally to leave the hospital and enter the community.

But at the same time, he was saying that he was still hearing voices, having really severe memory impairments, and that his medications weren't working at all.

And the psychologist actually challenged him on some of these assertions and said, well, you're able to basically

carry on this conversation with me.

But, again, he became defensive, talked about how impaired he was.

And what I thought was very noteworthy was, he was saying that, although he was well enough to leave the hospital and enter the community, that he was impaired to the point where he wouldn't be able to assist his attorney with his defense.

Q. And why, why is that significant to you?

A. Well, it shows very goal-oriented thinking to me.

09:47AM He was, obviously, very focused on wanting to leave the hospital and trying to convey that he was well enough for that, yet he wanted to make it known that he still wouldn't be well enough to, to face another competency evaluation or face other charges.

Q. And was this type of conversation that you noted here from Western State Hospital something that you experienced with Mr. Burke in your contact with him?

A. Parts of it was, yes. Certainly in terms of the exaggeration of symptoms.

09:47AM Q. If you could turn to page 19. The last paragraph. The largest paragraph on that page, government's exhibit 1. Beginning, on March 8, 2016.

Are you there, doctor?

A. Yes.

THE COURT: Excuse me one second. Miss Vargas.

(Discussion with clerk and Court off the record.)

(Pause.)

THE COURT: Okay. You may resume. Thank you. A little computer glitch on my part that enabled me to get online. But ready to go.

MS. VAN MARTER: Thank you.

THE COURT: That is online with the court, some court materials. Thank you.

BY MS. VAN MARTER:

09:49AM Q. All right.

Again, on page 19 of government's number 1, the last full paragraph beginning, on March 8, 2016.

In this particular paragraph, there's quite a bit of information there that you quote for your evaluation.

Could you please indicate the sections that are significant to you and why you included them.

A. Yes.

Mr. Burke was having a conversation with a social worker at Western State Hospital and pointed out several reasons why he felt he was ready to leave the hospital, not be a risk to the community.

But, again, at the same time, he reported having these other symptoms and said that it would interfere with being able to work with an attorney.

The social worker challenged him about that and she

asked him about a time when he had symptoms, but was yet successful in the community.

And I thought it was interesting how Mr. Burke said that, well, you refer back to a time when he was in a halfway house, but then the social worker said, to him, oh, along the lines of, well, you absconded from the halfway house.

And she, he said that, well, he couldn't stay there, again, because of the voices.

So he referred back to his symptoms, which contradicts what he was trying to tell the social worker earlier in saying, even though I have these symptoms, I could still do well in the community.

So the social worker brought that up to him, and there was some back and forth there, in that he then claimed, well, no, it wasn't the voices that caused me to leave the halfway house, I did that of my own choice, and I knew of the potential consequences.

Q. And why is that significant?

A. It's very significant because, again, here he's really making an effort to explain how the voices can affect one part of his functioning, but not the other, in a way to benefit him greatly, in the best way possible.

Q. And this time period, in March, carries on over into a number of incidences on page 20, where it appears that he, again, becomes concerned about the ability for the state to

09:50AM
09:51AM

refile the charges.

Was that --

A. Yes.

Q. -- was that something that was significant to you as well?

A. Yes, that was apparently an ongoing concern of his, that he brought up to numerous people.

Q. And at some point was he advised by the employees of Western State Hospital that they would be recommending to the state that they potentially should refile?

09:52AM A. Yes.

In Western State Hospital's release summary, they indicated in there that they had told him that they would be doing that.

Q. And did they tell him prior to his escape?

A. The way the release summary reads, it appears they did tell him this before his escape.

Q. Is that significant to you, that he was advised that they would be recommending the state, the state was going to refile and then subsequent to that he escaped the facility?

09:52AM A. Yes.

Q. Why?

A. Well, again, I think he had clearly let the staff know that he wanted to be released from the hospital, that he felt he was ready to be released from the hospital; yet he wouldn't be able to assist his attorney.

So the timing of all of that is quite suspect.

Q. Let's talk a little bit more about that summary that Western State Hospital provided after, provided, that you've included on page 20. And the long paragraph that begins on April 2nd, 2016.

Again, what was the conclusions in the summary from Western State Hospital after his escape?

A. Well, first of all, they noted his medication regimen and they said that he was stable on those medicines.

09:53AM They pointed out how he continued to complain of persistent auditory/visual hallucinations, memory problems, thought blocking.

And how they tried to have him take responsibility for these reports and how they tried to point out to him how discrepant these reports were, compared to his ability to function on the ward.

Also noteworthy were their statements about how he did not appear to be invested in treatment, that he seemed to just participate in a superficial manner.

09:54AM And one quote, too, which I thought was very telling, states, "efforts were undoubtedly devoted to trying to project a rather incapacitated person who, according to his own statements, was capable of handling responsibilities and privileges inherent in this milieu, but totally incompetent to assist his lawyer regarding his legal issues."

Q. **And I wanted to point your attention to a quote above that and a quote below that.**

And I think this is referring in the middle of the paragraph.

A. **Um-hum. Yes.**

Q. **There's a quote there.**

What is that quote?

A. **Yes.**

The staff noted that, despite his complaints, there was, "an obvious ability to function on a daily basis with lack of objective evidence of signs and symptoms expected to be present in cases of active psychosis."

09:54AM

Q. **And in layman terms, what does that mean?**

A. **In layman terms, that means he was functioning pretty darn well on the ward, and he would not have been doing that if he were truly experiencing the type of symptoms that he was complaining of.**

Q. **And at the bottom of that paragraph there is another quote.**

If you could read that, Doctor Low.

09:55AM

A. **Sure. Yeah.**

The staff there gave him a poor prognosis, due to, "no compliance with treatments beyond superficial participation with perceived requirements."

Q. **What does that mean?**

A. **Again, it means that he simply went with the flow and did**

what he had to do, but really wasn't very engaged in treatment.

Q. Okay.

So then from, on the next page at, is it accurate to say that government's exhibit number 1, page 21, then reflects kind of a -- excuse me, a history of your contact with him at the facility?

A. Yes.

It's a history of different contacts with medical staff, so.

09:56AM Q. The next section is your evaluation findings.

And that goes from page 22, all the way through 26.

Is that correct?

A. Yes.

Q. Okay.

Let's, let's first talk about what you have included here under the heading of mental status, noted on page 22, to the top of page 23.

And what were your findings in regard to Mr. Burke, with respect to mental status?

09:56AM A. Well, first of all, in terms of his mood, he was pretty much anxious every time I saw him, a little bit dysphoric or sad, not suicidal, though.

He spent a great deal of time discussing all the different psychotic symptoms that he was reportedly experiencing.

He would frequently even state, "I'm deep in psychosis."

While we were meeting, he would claim to have a visual hallucination of an orb, an orb be passing by.

He would speak about various memory impairments and what he called thought blocking. Saying that his thoughts were being taken from him.

And even throughout our meetings, he would claim that oh, you know, a thought was just taken from me right now. I was going to say something and now I can't remember.

But despite all these claims, all of our conversations were, I didn't have any problems understanding him.

He was very organized in his thought process, he was very clear, coherent, logical.

He was tangential at times. He would go off topic and usually just start talking about different psychotic symptoms.

But then I would just simply redirect him to what we were talking about and he was able to be redirected.

Q. **And is it significant to you his proclamations that, "I'm deep in psychosis"?**

A. **Um-hum. That was a very suspicious type of phrase to use.**

Most mentally ill people, the vast majority of severely mentally ill people, first of all, don't usually try to emphasize how mentally ill they are.

And most people who are actually in an acute psychotic

09:57AM
09:58AM

episode aren't able to recognize that they're in an acute psychotic episode and they would never come up with such a statement.

Q. And there's repeated reference, again, here, with respect to your conclusions that what you observed in your interactions with him did not appear to be consistent with his reported symptoms.

Is that accurate?

A. Yes.

09:59AM Q. On page 23, you go on to his course at the institution. What is that section supposed to address?

A. I use this section sometimes when I see some different behaviors that occur during the time that the person is with us.

Especially as it may relate to different changes in-housing, as is what happened with Mr. Burke.

Q. So, is that always included in your evaluations?

A. No.

Q. And why was it included here?

A. Because there were some other noteworthy things that

09:59AM happened.

Q. And what were those, as noted, just for the record, so we have it clear, on pages 23 to page 24 of exhibit 1.

A. Yes.

Well, some of this was related to Mr. Burke coming in and out of the Special Housing Unit.

Again, like I mentioned before, that's where he was initially placed, but then he was released from there, after successfully talking to the warden and giving a very rational, logical reason for why he shouldn't be held in there.

Q. **And why was that significant?**

A. **Well, it was significant because, again, it shows his level of intelligence, his level of being able to think rationally and logically.**

Because he essentially told the warden that, well, I supposedly escaped from a hospital, not a correctional facility, so I shouldn't be kept up here as an escape risk, per say.

This section also includes different observations of correctional officers. Nobody ever observed any unusual behavior. He was simply described as being very quiet, pretty isolative, having poor hygiene.

And, again, I detail how he was then kind of checking himself into segregation, basically because he was claiming that he was "in psychosis" and was either bothering his roommate through his pacing behaviors or things of that nature.

10:01AM Q. **And, again, that statement reflects back to your prior testimony regarding concerns about some kind of self awareness of being in psychosis.**

A. **Yes.**

Q. **On page 24, the last paragraph of that section, just above intellectual functioning, there's an event that occurs on June**

22nd of 2016 where there, again, is a quote from you in your report.

Are you at that location?

A. Yes.

Q. And could you explain to the Court the circumstances of that and what the, what Mr. Burke's statement was?

A. Um-hum.

There were two occasions in which he simply didn't want to meet with me. Which was fine.

10:02AM And there were also times when he wanted to end a meeting prematurely.

So, on this particular date, June 22nd of 2016, he explained that we could end the meeting early because, "I think you have enough information to render an opinion."

Again, I thought this was a very sophisticated proclamation to make and certainly not indicative of a person with severe mental illness who is unable to function well.

Q. And this is during the same time period where he is self reporting being deep in psychosis?

10:02AM A. Yes.

Q. At the bottom of that paragraph there's an indication that Mr. Burke -- paragraph, that paragraph, page 24, government's 1 -- did not want to take any of the tests.

Was that of any significance to you?

A. Yes.

Mr. Burke was very reluctant to engage in any psychological testing.

He made different excuses for why he didn't want to or could not do so, saying that he couldn't focus, saying that the other psychologists never used tests, they only talked to him, so why couldn't I just do that. But he eventually consented.

Q. **Okay.**

Let's talk a little bit about some of those tests then in this next section. Intellectual functioning, on pages 24. And then 25 also, personality dimensions.

First, did you administer any IQ tests for Mr. Burke?

A. **No.**

Q. **Why not?**

A. **IQ intelligence is noted to be a pretty stable construct. It wouldn't really change all that much, unless there was a significant head injury or whatnot.**

So I didn't feel a need for that.

Q. **And did, what results did you rely upon from his previous IQ test?**

A. **I relied upon older records, which were referenced in my first report.**

So, as you can see here, he was tested back in 2006 at Eastern State Hospital and he did pretty well.

High average range overall.

Very superior range in performance IQ, which is

nonverbal reasoning.

And then in the average range with his verbal IQ.

Q. And in the next section you referred to the TOMM test. What is that?

A. The TOMM is the Test of Memory Malingering. And I felt that this was something that I needed to give, because Mr. Burke repeatedly complained of poor memory.

Q. And what were the results of that test?

A. This is a test that distinguishes plausible memory complaints from feigned ones.

10:04AM

And this basically showed that Mr. Burke didn't really provide good effort on the test.

Q. And, in fact, I think at the left, the conclusion, or, what's your, what's your conclusion regarding those results, aside from his lack of effort?

Because I know that there's a mention here regarding just by chance guessing and versus what his actual scores were.

A. Yes.

This test has 50 questions on it. There's only two answers.

10:05AM

So, if you guessed on 50 of them, you would expect that somebody would get anywhere from between 21 and 29 correct.

There's two different trials, and he scored in those zones, on both trials, 22 on the first trial, 23 on the second trial.

So, again, that means that he scored no better than someone who is guessing.

Q. And with respect to the personality dimensions. What is the PAI?

A. The PAI is the Personality Assessment Inventory.

And it's an objective questionnaire that measures different areas of mental disorders and personality characteristics.

Q. And what were the results of Mr. Burke's testing on the PAI?

10:06AM

A. Well, first of all, he responded to some of the items in a very idiosyncratic or individual way.

In other words, interpreting them maybe in ways that they weren't meant to be interpreted.

But he also exaggerated symptoms and tended to portray himself in a negative manner.

Q. And is that consistent with your contact and observations of Mr. Burke --

A. Yes.

10:06AM

Q. -- during your time?

A. Yes.

Q. I just wanted to note also, on page 25, government's exhibit number 1, the third full paragraph down.

There is a reference to his level of motivation for treatment with respect to the testing.

What were the results or your conclusion there?

A. **Yes, the PAI showed that his level of motivation for treatment was lower than people who were typically in a treatment setting.**

That he's resistant to thinking about making changes within himself.

And that really goes hand in hand with what the staff at Western State Hospital found.

Q. **And in that next paragraph, you administered the MMPI-2. And why did you administer that?**

A. **Well, because the PAI wasn't -- well, I don't want to say it wasn't valid -- because of the exaggerated response style on that, I wanted to give another personality inventory to see if he would be more open and more forthright with that.**

But, unfortunately, he just responded in a, such an inconsistent way, that it just completely invalidated the test.

Q. **And was that of significance to you and how so?**

A. **Yes, it was significant, because it shows that he really, really wasn't cooperative in his approach.**

Again, this didn't surprise me though, because he wasn't pleased when I asked him to take this other test.

Q. **And the next test was the M-FAST.**

What is the M-FAST test?

A. **The M-FAST is the Miller Forensic Assessment of Symptoms Test.**

It's a screening test to determine whether or not somebody might be malingering psychotic symptoms.

Q. And you indicate that Mr. Burke made many spontaneous comments.

Was that before the administration of the test or during?

A. That was during.

And what's significant about that is, again, he was, it seemed to me he was trying to emphasize all of these different severe psychotic symptoms that he was having.

10:08AM

He spoke of having to search for aliens who were hiding in his room.

And then he talked about some other visual hallucinations that he had not previously reported.

Q. And what were the results of Mr. Burke's M-FAST test?

A. Well, he scored over the conservative cutoff score and that shows us that there's a probability that he's malingering psychotic symptoms.

Q. And in the last sentence of that paragraph that carries

10:09AM

over on to the top of page 26 --

A. Um-hum.

Q. -- indicates, "He endorsed the psychological symptoms that are rarely seen in combination, unusual hallucinations, and his self report was inconsistent with observed behavior."

Can you explain that last sentence?

A. **Yes, there are different areas that the M-FAST taps into. Again, it's just a screening test.**

But these were the areas that really seemed to be more significantly elevated for Mr. Burke.

Again, these were, he endorsed different symptoms that we, in the real world, they just don't happen together.

Unusual hallucinations, a lot of things that he reported are kind of unusual.

The visual hallucinations of these orbs, that's very atypical. And, again, his self report is inconsistent with observed behavior.

And that goes back to a lot of behavioral observations that I witnessed, other staff witnessed, as well as Western State Hospital staff.

Q. **Beginning on page 26, through page 30, it includes your diagnosis and prognosis section.**

Let's, first, what is your -- start with your diagnosis.

What is your diagnosis with respect to the evaluation of Mr. Burke?

A. **Yeah, I felt Mr. Burke met criteria for three different diagnosis.**

The first is schizophrenia, multiple episodes, currently in partial remission.

Malingering.

And then lastly, antisocial personality disorder.

Q. **Let's first talk about the diagnosis of schizophrenia. Could you please explain that diagnosis.**

A. **Sure.**

Schizophrenia is a thought disorder, in which you might see a combination of things, like hallucinations and that, hearing voices, maybe seeing things, delusions, which are very unusual beliefs, sometimes disorganized speech, disorganized thought patterns.

10:11AM **Negative symptoms, which is what we refer to as a diminished emotional expression.**

And what I viewed and what most every other mental health professional viewed, is that Mr. Burke presents with what we call this flat affect.

He's very blunted when he talks with you, there's not a lot of emotional responsiveness to, to different topics.

He has a very well-documented history of these sorts of symptoms. We have seen times when he's been off his medications and his thoughts are extremely disorganized and

10:11AM **don't make any sense.**

But I, I indicated that he's currently in partial remission, because not all of those symptoms seemed to be as severe as they could with other people, and they're not impairing his functioning significantly.

Q. **And you had referenced that there's a well-documented**

history.

Has this been consistent with the records that you reviewed from other evaluators as well as Western State Hospital?

A. Yes.

Q. All right.

THE COURT: Just, Doctor, if, his prior IQ testing was referenced on page 24.

And that shows that he, in the intellectual functioning section of your report, how did you, how did he come out on those tests? Or the tests that had already been administered.

THE WITNESS: How did he score on those tests?

THE COURT: Yes. Yes.

THE WITNESS: I don't have those, the actual numbers with me, but, again, he, he's scoring, what I would say --

THE COURT: Well on --

THE WITNESS: --higher than --

THE COURT: Well, under four, under intellectual functioning, you mentioned that test. He scored average on the verbal IQ --

THE WITNESS: Um-hum.

THE COURT: -- very superior range with performance IQ and high average on the full scale IQ.

THE WITNESS: Yes.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Okay.

And that, and you said those results appear to be the most accurate reflection of his true intellectual function.

THE WITNESS: Yes.

THE COURT: Okay. Thank you.

BY MS. VAN MARTER:

Q. And just a follow-up question.

10:13AM Again, why is it that you do not repeat an IQ test?

A. Well, typically, like I said before, IQ is a pretty stable construct.

And not only that, I didn't have any concerns about his intellectual abilities.

You know, every now and then we will get a defendant where these, the specific question is, hey, this person seems really low functioning, I don't think they're understanding us.

And so, in those cases, we're going to have to do much more thorough cognitive testing.

10:13AM THE COURT: And I elicited the questions and answers, in order to make sure that the record reflects we're not dealing with a borderline intellectual issue.

MS. VAN MARTER: Yes, Your Honor.

THE COURT: Thank you.

BY MS. VAN MARTER:

Q. **All right.**

Let's go on to your second diagnosis, Doctor, with respect to malingering.

What is malingering?

A. **Malingering is an intentional production of either really grossly exaggerated symptoms, if not outright feigned psychological symptoms; where there's some sort of a motivation to obtain some other goal, such as financial compensation, maybe somebody whose trying to get on disability income, somebody whose trying to obtain drugs, somebody whose trying to evade criminal prosecution.**

Q. **And in this particular case, we talked a little bit about this throughout your testimony, but what, what would, what did you rely upon in making this diagnosis?**

A. **I relied upon several, several sources of data.**

Again, we went over all of the observations and reports from Western State Hospital, in which they questioned the veracity of his statements about the severity of his symptoms, because they weren't observing it.

I relied upon my own observations of such, as well as the observations of our staff members.

I relied upon some of his -- well, again, a lot of the atypical statements that he would make, that most severely psychotic people don't talk about. Like, "I'm in deep psychosis

right now."

Then, of course, the testing supported all of the hypothesis, too. And we went through that.

He was over exaggerating symptoms on the PAI, he exceeded a conservative cutoff on the M-FAST, he showed very poor effort on the TOMM.

So I think there are plenty of data points that support the malingering diagnosis.

Q. And is this also consistent with some of the more recent records that you reviewed from Western State Hospital regarding what their opinion was with respect to Mr. Burke?

A. Yes.

Q. And at the end of that paragraph on page 26, there's a sentence that appears, "he believes if he is viewed to be extremely psychotic, he may be able to evade criminal prosecution."

A. Yes. Yes.

And again, in the Western State Hospital records, he clearly articulated that he was so impaired, he would not be able to assist in his defense.

Q. And I don't want to jump around too much, but we're going to talk a little bit about Doctor Brown's report in a minute.

In your, have you had the opportunity to review Doctor Brown's report, submitted by the defense as an exhibit in this case?

A. **Yes.**
Q. **And did you see information within Doctor Brown's report consistent with your diagnosis of malingering?**
A. **Yes.**
Q. **And just generally, what types of information was referred in Doctor Brown's report that's consistent with your diagnosis?**
A. **I thought it was interesting how, when she first met with Mr. Burke, one of the first things that he wanted to emphasize was that my report was incorrect and that he truly was mentally ill.**

10:17AM

Again, I find that very unusual for somebody to really want to bring attention to their mental illness.
Q. **Let's move on.**
And your last diagnosis, Doctor, of antisocial personality disorder. If you could please tell the Court the basis of that diagnosis.
A. **Yes.**
This is a personality disorder in which what's prominent is a long-standing pattern of disregarding other people's rights or violating other people's rights.

10:17AM

And it begins in either childhood or adolescence and it continues into adulthood.
And, historically, Mr. Burke had a diagnosis of a conduct disorder when he was a teenager.
He's run away, he was involved with thefts,

destruction of property. Since age 15 he's continued with these sorts of behaviors.

He also exhibits traits of irritability, aggressiveness, deceitfulness, lack of remorse for his actions.

Q. And there's a last paragraph there, just before your ultimate opinion, with respect to competency regarding prognosis.

And what's your opinion regarding the prognosis of Mr. Burke?

10:18AM A. Overall, I said it's poor. He didn't show good motivation for treatment, as shown in the Western State Hospital records, and I believe that he'll continue to exaggerate his psychotic symptoms, if he thinks it benefits him.

On the other hand though, I also want to acknowledge that, you know, this man does have schizophrenia, he does need to stay on his medication, and he does need to be, to be monitored for that.

He benefits from the medication, regardless of what he says about that.

10:18AM Q. And the last segment of your report, just for the record, noted on pages 27, 28, and 29, of government's exhibit number 1, reflects your opinion regarding his overall competency.

What is your opinion regarding Mr. Burke's competency?

A. I believe that he is able to understand the nature and consequences of the proceedings against him and that he is able

to assist counsel in his defense.

Q. And what is the basis of that opinion?

A. Well, I administered a competency instrument, semi-structured instrument and he was able to clearly understand the nature of his probation violations.

He had been able to discuss all those in pretty good detail with me, in a bit of a more informal conversation.

Again, he's a bright guy, so he's not going to have any problems understanding all of the different factual portions of court proceedings.

10:19AM

You know, what a trial is and who the different players in the court are and what they do and different pleas that are available.

I felt that he was able to assist a defense, if he wants to.

Again, he asserted that he couldn't remember, due to thought blocking and stating that he was psychotic.

But, again, like I said, the testing showed that he's providing poor effort with regard to memory. So I think that

10:20AM

that is not a credible claim.

Q. And regarding the testing. For the record, are you referring to the ILK test, as noted on the bottom of page 27, as the testing that you administered?

A. That's one of them.

I also administered the RCAI, the Revised Competency

Assessment Instrument.

Q. And what were the results, first, of the ILK?

A. The ILK, gives us information about, again, how much effort a person is putting forth in answering legal questions.

And out of 61 questions, he only got 29 of them right. Again, this is no better than chance, a little bit less than chance.

So it shows that he was guessing or, you know, just putting forth poor effort into those answers.

10:21AM Q. And the second test? What test is that and what were Mr. Burke's results?

A. The RCAI is a semi-structured interview and that's where we get into all the nitty gritty about different things that happen in court, different participants, his attorney, his relationship with him.

And again, he really didn't show any kind of significant impairment at all.

Q. Okay.

And the basis of your opinion, does that also include

10:21AM some of the records you reviewed in interactions by Mr. Burke with Western State Hospital?

A. Yes.

Q. Including some statements regarding the legal situation he was in and things that you previously testified to.

A. Yes.

Q. **And is there anything else, before we move on to Doctor Brown's report, with respect to your overall, your ultimate conclusion regarding Mr. Burke's competency, that we missed?**
A. **No, I don't think so. I think we were pretty thorough.**
Q. **All right.**

Let's talk a bit --

THE COURT: Excuse me a second.

On page 29, at the bottom -- sorry, page 29 at the bottom. The last paragraph says, "Overall, Mr. Burke demonstrated an average ability to understand the nature and consequences of the court proceedings against him and an average ability to properly assist counsel in his defense.

From the available information, there is no evidence to indicate the defendant suffers from a mental disorder or disease that would substantially impair his present ability to understand the nature and consequences of the court proceedings brought against him or substantially impair his ability to assist counsel in his defense.

He is exaggerating his psychotic symptoms and exaggerating, if not feigning, memory impairment.

Mr. Burke has the ability to assist counsel, should he so choose."

Did I directly correctly read that paragraph out of your report?

THE WITNESS: Yes, Your Honor.

THE COURT: Thank you. You may go.

MS. VAN MARTER: Thank you, Your Honor.

BY MS. VAN MARTER:

Q. You previously testified you had the opportunity to review the defendant's exhibit from Doctor Brown, regarding her evaluation.

A. Yes, I did.

MS. VAN MARTER: And I know that that has been submitted as a defense exhibit, I don't have any objection to the admission of that exhibit at this time, Your Honor.

10:23AM

MR. SCHWEDA: Which exhibit is that?

MS. VAN MARTER: Your exhibit number 1. Doctor Brown's report.

THE COURT: I have that as document 250 on ECF.

MS. VAN MARTER: ECF 250.

I know he marked it as an exhibit as well, Your Honor.

THE COURT: It should be --

MS. VAN MARTER: Yes.

MR. SCHWEDA: Right.

10:24AM

And I have it marked, Your Honor, as exhibit number 13, in this binder.

THE COURT: Exhibit 13.

MR. SCHWEDA: Or 213.

THE COURT: What?

MR. SCHWEDA: 213.

THE COURT: Defense exhibit 13 admitted.

MR. SCHWEDA: Yes. Yes.

THE COURT: For all purposes?

MR. SCHWEDA: No, Your Honor.

Again, we would ask that it just be admitted, until we have a chance to --

THE COURT: Well, it's admitted. I'll keep it under seal, temporarily, until you have a chance to brief, as we have indicated, and you'll get that done by next Tuesday --

10:24AM MR. SCHWEDA: Yes, Your Honor.

THE COURT: -- as I recall, at noon. Okay. And then we're good to go then. It's in.

Exhibit number 3, sealed at the moment.

And that's Doctor Brown's report. Exhibit 13. Excuse me.

MS. VAN MARTER: Exhibit 13.

Thank you, Your Honor.

MR. SCHWEDA: Yeah, 113, actually, Your Honor, so --

MS. VAN MARTER: Okay. Correction. According to

10:24AM Mr. Schweda, 113. Exhibit 113 of the defense --

THE COURT: Okay.

MS. VAN MARTER: -- has been admitted.

THE COURT: Okay.

BY MS. VAN MARTER:

Q. Doctor Low, you indicate --

THE COURT: Oh, and for the record, Doctor Brown is here?

MR. SCHWEDA: Yes, she's seated in the courtroom.

THE COURT: Yes, I assumed. Doctor Brown is present. Thank you. Go ahead, please.

BY MS. VAN MARTER:

Q. **And, Doctor Low, you had the opportunity to read the entirety of Doctor Brown's report or evaluation; is that correct?**

10:25AM A. **Yes.**

Q. **And in reviewing that evaluation, did that change or impact your ultimate opinion with regard to Mr. Burke?**

A. **It did not change my opinion on Mr. Burke.**

Q. **And why not?**

A. **Well, she also, I believe, if I'm interpreting what she wrote correctly, I believe she came to the same conclusion I did; in that, he was able to understand the nature of his probation violations and assist counsel.**

Q. **And in reviewing this report, did you have, was there**

10:25AM **anything of concern or significance to you regarding Doctor Brown's report?**

A. **Yes, there were a few things.**

Q. **Okay.**

Let's, let's -- and in your review of this, or -- I think there was specifically three particular items that we

discussed.

Is that correct?

A. Yes.

Q. Okay.

Let's start first with your first concern. And I think that related to personality testing.

Is that correct?

A. Yes.

Q. Okay.

10:26AM And could you please tell the Court what it is about that, that stood out to you?

A. I was curious as to why Doctor Brown did not administer a separate personality test, first of all.

Q. And why is that significant?

A. Well, I would think that that would be an important thing to do, if she were completing an independent evaluation.

Q. And is that something that is standard in the field?

A. Yes.

Q. When conducting a competency evaluation?

10:26AM A. Yes, because it had been several months between the time I saw him and Doctor Brown saw him.

Q. And is that why you don't just rely on the previous personality tests that have been conducted with Mr. Burke earlier?

A. Correct.

Q. **Kind of directed towards the Court's questions, it's important to repeat those tests?**
A. **It is for personality tests, because different things can change, in lots of different ways.**
And a person's results can be vastly different from one time point to another.
Q. **And according to Doctor Brown's report, what personality tests did she rely upon?**
A. **She relied upon my test, the Personality Assessment Inventory, that I gave to Mr. Burke.**
Q. **And then no other personality tests or --**
A. **No.**
Q. **-- information.**
A. **No.**
Q. **And what was the second area of concern with respect to Doctor Brown's report that you noted?**
A. **Well, getting back to the PAI, I believe that she misinterpreted the results that I obtained.**
Q. **And how so?**
A. **Well, she indicated that I said that there was an exaggeration of his symptoms, but then she goes on to point out that all the symptoms that he endorsed were the same symptoms that were reflected in the record.**
And, to me, that doesn't show a good understanding that that's the whole point of exaggeration is that he's

10:27AM
10:27AM

endorsing these same symptoms at a very high degree of a very severe level.

Q. And, just for the record, do you have the page in mind with respect to Doctor Brown's report?

A. Yes, that's at the top of page 25.

Q. And so, even though Mr. Burke is reporting these symptoms, there's still an exaggeration of the same symptoms.

A. Yes.

Q. And was, and is that directly relevant to any of your diagnosis then?

10:28AM

A. It's relevant to the malingering diagnosis.

THE COURT: What part -- on what portion is it? Page 25?

THE WITNESS: I'm sorry. It's --

THE COURT: Let me get there.

THE WITNESS: The top of page 25. Where my results are summarized.

That very first paragraph on page 25.

THE COURT: Which paragraph?

10:29AM

Is it the one that begins, October 28th, or the one before or after that or if you --

THE WITNESS: Oh.

THE COURT: If you would identify the paragraph.

THE WITNESS: It's the very first paragraph.

THE COURT: First paragraph. Okay. Hang on.

THE WITNESS: Yes.
THE COURT: All right.
And having read -- you're talking the first full paragraph or the first paragraph?
THE WITNESS: That first full paragraph.
THE COURT: Beginning with, on October 28th?
THE WITNESS: No.
THE COURT: That one. Okay.
THE WITNESS: Yes.
10:29AM THE COURT: The profile was associated with?
THE WITNESS: The one above that.
MS. VAN MARTER: And I believe, for the record --
THE WITNESS: Yours printed out differently than mine.
THE COURT: Perhaps that's true.
THE WITNESS: Yeah, it's the paragraph that starts off with the PAI.
THE COURT: Okay.
That's page, that's actually page 24.
THE WITNESS: Yes, that starts on page 24, I'm sorry.
10:30AM MS. VAN MARTER: And it carries over to the top of 25 on this copy.
BY MS. VAN MARTER:
Q. But, yes, it begins with, the PAI is an objective personality inventory; is that correct?
A. Yes.

THE COURT: So, you're referring to the PAI paragraph that -- okay. Give me a moment.

THE WITNESS: Yes.

THE COURT: And what's the significance of, the significant point that you're making about that?

THE WITNESS: It seems as though she is trying to downplay the exaggeration, unless I am reading it incorrectly, but it seems to me as though she's saying that, well, Doctor Low says that he's trying to create an unfavorable impression and exaggerating his profile; yet the symptoms that he's reporting are the same sorts of symptoms that other people have seen.

But she's not acknowledging that, although that may have been partly the case, that it's still a gross over exaggeration of the symptoms.

THE COURT: Okay. Thank you.

BY MS. VAN MARTER:

Q. **And, again, that's specific to the malingering diagnosis.**

A. **Yes.**

Q. **And does it appear to be an acknowledgment from Doctor Brown regarding that malingering tendency with those exaggerated symptoms?**

A. **Right.**

Q. **I'm going to go to page 24.**

The page before, under Doctor Brown's psychological competency testing.

And the second paragraph there, the Miller Forensic Assessment of Symptoms.

Was there anything with respect to that testing that was of concern to you, as noted in that paragraph?

A. **About midway through the paragraph, Doctor Brown writes about how I did not follow-up with the SIRS-2, but she did.**

And what I wanted to bring up about that is that research has shown that the SIRS-2 actually is not a very good test. There are some serious questions with regard to its validity. And that is the exact purpose why I did not administer that test.

THE COURT: The SIRS-2.

THE WITNESS: Correct.

BY MS. VAN MARTER:

Q. **Well, let's back up just a minute.**

What is the SIRS-2 and what is the history of the SIRS-2?

A. **The SIRS-2 is, as it says, a structured interview of reported symptoms.**

The 2, obviously, is the second edition.

It is authored by a very well-renowned psychologist in the field of malingering, Doctor Rogers.

And when he revised it, for some unknown reason, he omitted a portion of the sample which, in turn, skews the results.

And in recent continuing education workshops, which are focused on malingering, we have been advised by the experts in the field that this is not a good test to use and you should really avoid using it.

BY MS. VAN MARTER:

Q. **And so, therefore, is it a practice within the Bureau of Prisons, as a neutral evaluator, to not use that test?**

A. **As far as I know, for those folks who have been made aware of that, yes.**

10:33AM Q. **And did you specifically attend that continuing legal education that discussed the errors with the SIRS-2?**

A. **Yes.**

Q. **And did you have an opportunity to review Doctor Brown's curriculum vitae?**

A. **I did.**

Q. **And did she attend any of the same training with respect to that area?**

A. **She actually attended the same workshop in 2014 in which that was addressed.**

10:33AM Q. **And so, based upon what you now understand to be some of the flaws with that test, then are those results considered to be valid?**

A. **I don't think so.**

Q. **Okay.**

And I think the last area that I wanted to direct your

attention to with respect to Doctor Brown's report, I think, is probably the most significant.

And that starts on page 26 to 27 on to 28, but predominantly on page 27 out of the defense exhibit.

Did you have any concerns regarding the ultimate opinion provided or opinions provided by Doctor Brown?

A. Yes, I did.

Q. And what are those concerns?

A. Well, first of all, I was very confused as why there were two separate paragraphs with regard to competency. And they seemed to be saying different things.

10:34AM

And even within one of the sections, it seemed to be saying different things.

So, I just wasn't quite clear what was going on.

For example, under that first section of competency in the first paragraph.

Q. Is that on page 27?

A. On page 27.

Q. Yes. Please continue.

10:34AM

A. She writes, "In my opinion, he should have relatively little difficulty with a simple case of a probation violation."

And then in the next paragraph though Doctor Brown goes on to say, "I believe he's experiencing mild impairment in his ability to participate in legal proceedings. These symptoms are likely to adversely affect his ability to interact and plan

a defense appropriately with his attorney.

He's likely to make poor, if not irrational judgments, in weighing the costs and benefits of alternative legal options."

So, that created confusion for me, because she was first saying that he shouldn't have problems in this simple case of a probation violation; yet she then says that he will not be able to interact and plan a defense with his attorney. So that was contradictory.

10:35AM Q. So within that first -- well, the first concern is that there's two separate competency sections.

Why is that --

A. Yes.

Q. -- significant?

A. There's no need for two.

Again, it's very confusing. I've never seen a report written in such a manner.

Q. And if we first look at the first competency section then, if I understand you correctly, Doctor Low, the two paragraphs

10:36AM are inconsistent with each other.

A. Correct.

So, after the reader reads those two paragraphs that -- well, I was just sitting there thinking, so what, what is she saying? I didn't know what her conclusion was.

Q. And then there's a second competency section. What, if

anything, is significant there to you?
A. I thought what was, what really stood out was how Doctor Brown kind of bifurcated the competency standards, in terms of parsing out, parsing out his abilities with regard to facing a probation violation versus having to, perhaps, go to a trial in a more complicated manner. I thought that was highly unusual.
Q. Is that, is that a standard in the field, in regard to an overall competency conclusion?
A. No, I've never seen that before.
10:36AM Q. And so, with respect to your experience, competency is, the standard of competency are the two factors you previously testified to.
A. Correct.
And it's supposed to be applied to the defendant's current charges only.
Q. And you've never seen it bifurcated by charge.
A. Never.
Q. But, ultimately, in this second competency section, the conclusion by Doctor Brown is what?
10:37AM A. Is that he is able to understand the nature and consequences of his current charges of probation violations, and that he would be able to assist.
Q. And does she have a similar prognosis, in terms of his amenability to treatment, as you?
A. In terms of his amenability to treatment?

Q. **Let me rephrase.**

Does she have the same or similar prognosis, regarding concerns of him returning into the community?

A. **You know, I'm not sure if she addressed that.**

She simply talked about how he probably would not be competent, if having to face a more complicated trial procedure.

Q. **Okay.**

Let me just refer you to page 29. I don't mean to confuse you in wrapping up my questions here, Doctor Low, so I apologize for that.

10:38AM

In the second to last sentence, on the first full paragraph, "He poses a very real danger of offending in a violent manner."

A. **I'm sorry, the second to last paragraph?**

THE COURT: The very last paragraph --

MS. VAN MARTER: Yes.

THE COURT: -- so to speak, of the, of the report. "Although attempts have been made to intervene."

THE WITNESS: Oh.

10:38AM

THE COURT: That paragraph.

Do you have that?

THE WITNESS: Oh.

MS. VAN MARTER: No, no.

THE COURT: Pagination may be different, but I gave you the language, so you could cue in.

THE WITNESS: Yes. Yes.

To the best of my knowledge -- well, it looks like she's quoting, she's quoting somebody in a 2007 quote.

And, again, at the beginning, it says, "I cannot say it as well as that," so, yes, apparently she agrees. She agrees with that quote that she's stating. Yes. About the danger of offending in a violent manner. Yes. So it appears that that is her opinion, too.

MS. VAN MARTER: If I could have a moment, Your Honor.

10:39AM THE COURT: Yes.

(Pause.)

MS. VAN MARTER: I don't have any other questions of Doctor Low, Your Honor.

THE COURT: Okay.

Let's take a short break, but how long do you anticipate cross?

MR. SCHWEDA: Maybe 45 minutes.

THE COURT: Okay.

And then is that your only witness?

10:39AM MS. VAN MARTER: Yes, Your Honor.

THE COURT: And then you'll have Doctor Brown.

MR. SCHWEDA: Correct.

THE COURT: Okay.

So let's take 10 minutes at this time.

(Whereupon Court was recessed at 10:39 a.m.)

(Whereupon Court reconvened
in the courtroom at 10:50 a.m.)
THE COURT: Please be seated. Let's resume. You may proceed.
MR. SCHWEDA: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHWEDA:

10:56AM Q. Good morning, Doctor Low.
A. Good morning.
Q. I'm Pete Schweda, I represent Mr. Burke.
Now you indicated that there was no need to redo the IQ testing, because that's something that doesn't change over time, correct?
A. Correct.
It doesn't typically change, unless, like I said, there's a major head injury or something like that.
Q. But isn't it true that, in 2007, when you evaluated Mr. Burke, you did do IQ testing, correct?
10:57AM A. I did.
Q. And, in fact, the results of your IQ testing were different than the IQ testing that was performed at Eastern State Hospital; isn't that correct?
A. His results were a little bit lower, I believe, yes, with

me.

Q. In fact --

MR. SCHWEDA: Your Honor, I move to admit, again, with the, with leave to address the sealed nature, defendant's exhibit 107, which is Doctor Low's 2007 report and --

THE COURT: Any objections?

MS. VAN MARTER: Yes, Your Honor.

We object to relevance. That report's not the basis of her opinion today.

10:58AM Whatever opinions were rendered in that prior report, there was retesting and the purpose of the evaluation was also different.

So, we don't believe it's relevant for the Court's consideration on this particular issue.

THE COURT: I'm not -- her opinions -- he's entitled to use that for cross-examination purposes.

So, I'm happy to have you use it for cross-examination, Mr. Schweda, but I'm not certain what its substantive use is here.

10:58AM So, I regard it sort of the same approach, that she's issued a prior report.

Do you want to impeach her credibility on the issue of IQ, and show her that sort of thing and --

MR. SCHWEDA: Well --

THE COURT: On the other hand, if you want it for the

purposes of substantive evidence, that he had a lower, the testing results were different, then, to that extent, that portion of the report is different and I would consider that as admissible.

MR. SCHWEDA: All right.

Well, I'll start with that, Your Honor, and I'll work on, work my way on some other stuff here, because I --

THE COURT: Go ahead.

MR. SCHWEDA: -- that I wanted to address.

10:59AM BY MR. SCHWEDA:

Q. Doctor Low, in front of you, you have a small white binder.

A. Yes.

Q. Would you open that up to tab 7.

And go to page 20.

A. Okay.

I'm there.

Q. And this is your 2007 report, correct?

A. Yes.

Q. And preliminary -- this was a request from Judge Nielsen to

10:59AM determine whether Mr. Burke should go to a USP or to some type of a treatment facility, correct?

A. Well, it was to see whether or not Mr. Burke suffered from a mental disorder, such that he would need inpatient treatment.

Q. And your opinion was that he didn't need inpatient treatment, correct?

A. **Yes.**
Q. **And that he would do just fine at a prison.**
A. **That his needs should be adequately met at any other given institution, yes.**
Q. **And you realize that he says that, as a result of that, when he served his 37 months at Victorville, he told you that that's when he had his biggest psychotic event, correct?**
A. **That's what he reported.**
Q. **So, if you would go to page 26 -- 20, excuse me.**
11:00AM **THE COURT: Page 20?**
MR. SCHWEDA: Yes.
Under intellectual functioning.
BY MR. SCHWEDA:
Q. **In the middle of that paragraph, you report the results of your IQ testing, correct?**
A. **Yes.**
Q. **And, in fact, your IQ testing was average.**
A. **Yes, but if you read everything above it, you'll see that he, Mr. Burke actually admitted that he wasn't trying his**
11:01AM **hardest.**
Q. **Okay.**
So, I'm going to ask you some specific questions and I would --
THE COURT: I'm sorry, are you asking about intellectual functioning, Mr. Schweda?

MR. SCHWEDA: Yes. And --
THE COURT: On page 20?
MR. SCHWEDA: Yes.
THE COURT: And then -- go ahead.
BY MR. SCHWEDA:
Q. And it says there, in the middle, "the defendant's performance on the WAIS-3 indicated that he was in the average range of intellectual functioning, when compared with individuals his age, with an estimated scale quotient IQ of 94." Which is average, correct?
11:01AM
A. Yes.
Q. Which is lower than how he scored in, at Eastern State Hospital.
A. Yes.
Q. And the Eastern State Hospital testing was done in 2006.
A. Yes.
Q. Can -- if someone is suffering from psychosis and having a psychotic event, can that, would that have the possibility of changing their score on an IQ test?
11:02AM
A. Yes, it could.
Q. In your, your opinion today -- or let me ask you differently -- your recommendation today is that he will function okay in a prison or should he receive some treatment?
MS. VAN MARTER: Your Honor, I'm going to object to relevance.

The scope of her evaluation was for the purpose of competency.

THE COURT: That's correct. Sustained.

BY MR. SCHWEDA:

Q. **Well, do you have an opinion on that?**

THE COURT: We, counsel, this is a competency hearing. And I, I want to make that clear. We are here to determine competency. That's the nature of the hearing.

MR. SCHWEDA: And I understand that, Your Honor, and --

11:02AM

THE COURT: So I -- so, so you're insistent, as is appropriate, as a diligent attorney, to not address issues that you don't think were appropriately noted for hearing today, and it was puzzling to me that you were asserting that you were going to elicit from Doctor Brown, a setting for him, hospitalization versus prison.

When, in fact, we haven't reached, we haven't reached the question of the violations themselves and, therefore, resolution of a potential violation was not for me today, I'm only here for competency.

11:03AM

MR. SCHWEDA: Okay.

Then would it be possible to have Doctor Low come back after the court makes a determination --

THE COURT: Why would -- well, that's not my call. I'm not a lawyer in this case.

So, I'm not going to -- I'm not going to order her back, when there's no issue currently before the Court.

But the nature of your approach seems to concede violations of the supervised release, because you're moving to remedy an outcome, rather than competency.

Help me understand your position, would you?

MR. SCHWEDA: Well, while I'm not in a position to concede the violations, I think it's pretty obvious that Mr. Burke absconded. There's --

11:04AM THE COURT: That's not the only violation.

MR. SCHWEDA: I understand that.

But if, if we just go to that portion, and he is sentenced --

THE COURT: Why would I do that? Why would I do that today?

That's not the issue for today, Mr. Schweda. You didn't ask for that to be the issue. This was simply, this is a competency hearing. It's been set as a competency hearing for weeks and months and continued, at your request so your doctor could, in fact, prepare diligently. We are here for competency.

MR. SCHWEDA: All right.

THE COURT: Go ahead.

MR. SCHWEDA: Well, Your Honor, I just, as an offer of proof, I just wanted to --

THE COURT: Counsel, we are here for competency.

MR. SCHWEDA: I understand.

THE COURT: And address your remarks on competency.

If, at another hearing, you have other issues, that you actually have noted up, that would be different.

But, in point of fact, you have not filed any such motions, except an objection to the release of information to other entities.

And that's the only affirmative pleading that you filed.

11:05AM **MR. SCHWEDA: All right. Well, then I would --**

THE COURT: That's just the way it is.

MR. SCHWEDA: So I would orally move that, Your Honor.

THE COURT: I'm sorry, what?

MR. SCHWEDA: I would orally move that the Court consider some very limited testimony, as to the appropriate placement.

THE COURT: Well, counsel, you can't do that in the middle of a hearing, when you haven't given adequate notice, either to Doctor Low or to Miss Van Marter, that you were going 11:05AM **to address that issue.**

You wouldn't want to be disadvantaged in that fashion, would you?

You would tell me immediately, I haven't had time to study this issue, I need to do research. Much as you've done in this case already on the issue of disclosure of the reports, and

I've said okay.

Go ahead.

BY MR. SCHWEDA:

Q. Now, you agree that Mr. Burke suffers from schizophrenia?

A. Yes.

Q. And that would include that he has hallucinations, correct?

A. Yes.

Q. And, but it is your testimony that he's exaggerating the hallucinations?

11:06AM A. I believe he is.

Q. But he's had hallucinations for a long, long time. It's reported in his medical records, correct?

A. Just because a person has a history of it doesn't mean that they're exaggerating it.

Q. I asked you a question, ma'am, please answer, please answer just the question.

A. Could you repeat.

MS. VAN MARTER: Your Honor, she was trying --

THE COURT: No, he asked the question, Doctor Low.

11:06AM Please answer his question.

THE WITNESS: Could you repeat it, please.

BY MR. SCHWEDA:

Q. May I have the question read back, Your Honor?

THE COURT: I have it. "But he's had hallucinations for a long, long time. It's reported in his medical records,

correct?"

That's the question.

THE WITNESS: Yes, he has a history of hallucinations.

BY MR. SCHWEDA:

Q. In fact, if you go to tab one of the binder there, that's a discharge summary from when Mr. Burke was 11 years old, from Sacred Heart Hospital's medical, mental ward, correct?

A. That's what it appears to be.

Q. And so, he was, the first time he was committed as a mental patient was at age 11, correct?

11:07AM

A. Yes.

Q. Now your report from 2007, exhibit number 107, lists that his first hospitalization for mental problems was at age 13, correct?

A. Could you tell me what page you're on, sir?

Q. Well, it's --

THE COURT: 13.

BY MR. SCHWEDA:

Q. It says it on page five.

11:08AM

THE COURT: Oh, okay.

THE WITNESS: Where on page five? Oh, I see it. I see it.

BY MR. SCHWEDA:

Q. The last paragraph. The first two sentences.

A. Yes, it does say that.

Q. **And, in fact, on page -- and that would have been in 2001, correct?**

THE COURT: I'm sorry, what was your question, counsel?

MR. SCHWEDA: That would have been in 2001.

THE COURT: Well, was that -- it's, as it indicates, at age 13, whenever that was.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

11:08AM Q. **Well, if you go to page 13 of your report.**

THE COURT: That's correct. It says October 3rd to October 17, 2001.

BY MR. SCHWEDA:

Q. **And it also says that, there's a sentence that says, "He was paranoid and endorsed auditory hallucinations."**

THE COURT: Where are you on that page, counsel?

MR. SCHWEDA: Pardon?

THE COURT: It might help if you cited to a specific spot on the page.

11:09AM **I was just citing the date for you, so you could locate it.**

MR. SCHWEDA: Sure.

THE COURT: Is there another paragraph on that page where you're referring to it and is that page 13?

MR. SCHWEDA: It's the same paragraph, Your Honor.

THE COURT: Same paragraph. Okay.
MR. SCHWEDA: Yeah.
THE COURT: Well, how far down is it?
MR. SCHWEDA: It's about two thirds of the way, almost two thirds of the way.
THE COURT: Okay.
MR. SCHWEDA: Do you see that Doctor Low?
THE COURT: On the right hand margin, go down to the word, "was."
11:09AM THE WITNESS: Yes, I do see it.
THE COURT: Okay.
So it's there; is that correct?
THE WITNESS: I'm sorry?
THE COURT: It's there.
THE WITNESS: Yes, it is.
THE COURT: What else, Mr. Schweda?
BY MR. SCHWEDA:
Q. And on -- if we go back, and on the page before, you reviewed school records, correct?
11:10AM A. Yes.
Q. And in that last paragraph you report that, in October of 2001, teachers rated him as being out of touch with reality, having strange ideas, babbling to himself, and repeating one fact over and over, correct?
A. Yes.

Q. **And, in fact, his history is such that he will say he, he doesn't have any mental problems. Over the course of his history of his life, he will go in and say, I don't have any mental problems. But then say, I do have mental problems. And goes back and forth like that.**

A. **He had a tendency, early on, to minimize his psychiatric history, yes.**

So, I remember, back in 2007, when I saw him, he minimized his psychiatric history.

11:11AM **And when I saw him this year, he over emphasized his psychiatric symptoms.**

Q. **The -- go to page 10 of your report.**

MS. VAN MARTER: Of which report? Are we still on the 2007 report?

MR. SCHWEDA: Correct.

MS. VAN MARTER: I'll renew my objection regarding relevance, Your Honor.

THE COURT: What is it that we're doing, Mr. Schweda?

MR. SCHWEDA: Well, Your Honor, I'm trying to

11:11AM **demonstrate that she's stating -- her opinion of malingering is based upon his over reporting hallucinations, and I'm trying to demonstrate that he's always had hallucinations and he's consistently reported, since a very young age. I will get to his --**

THE COURT: Why don't you simply ask her that. Why

don't you simply ask her about her 2007 reports.

MR. SCHWEDA: Because I think it's important that I bring out the history and show how consistent it is and --

THE COURT: Go ahead.

MR. SCHWEDA: -- and all the different sources --

THE COURT: Go ahead.

BY MR. SCHWEDA:

Q. So, he was at -- you interviewed Brenda Chalinor, who was a U.S. probation officer, back in 2007, correct?

11:12AM THE COURT: Are you asking her if she remembers doing that or are you citing a particular page?

MR. SCHWEDA: No, I'm asking if she recalls that.

THE COURT: Well, is it in the report?

MR. SCHWEDA: Yes.

THE COURT: If it's in the report, then would you do me a favor and just cite to the report, rather than engage in this kind of questioning.

MR. SCHWEDA: Sure, Judge.

THE COURT: That way it, will be a little bit more

11:12AM efficient for the witness and for the Court.

MR. SCHWEDA: Okay.

THE COURT: Thank you.

So, what page?

MR. SCHWEDA: Page 10.

BY MR. SCHWEDA:

Q. Second to last paragraph.

A. No, Mr. Schweda, that is in the legal section.

So those are results that I summarized from the legal discovery. I did not personally contact the probation officer, because I would have put that under my collateral section, which started on page 18.

Q. Okay.

A. Because I interviewed his mother.

11:13AM Q. Okay.

So bear with me, Doctor Low. Would you see the second, second to the last paragraph on page 10?

A. Yes.

Q. Would you read that first sentence?

A. "Miss Chalinor, U.S. Probation Officer, was telephonically contacted on June 4th, 2007."

Q. So you did speak with her, correct?

A. Again, I don't -- I can't recall that and I would not have put it in that section, typically.

11:13AM That could be an error on my part, but I don't have that file with me, so I have no way to confirm to confirm or verify that.

Q. Well, you can verify that it's in your report.

A. Yes, it is in the report.

Q. And you don't have --

A. **Sorry.**
Q. **You don't have any recollection that would differ from that, do you?**
A. **I don't have a lot of recollection of a lot of the specifics in this report, as it is, because it was nine years ago.**
Q. **Okay.**
So let me ask the question again:
You don't have any recollection that would differ from that, correct?
11:14AM
A. **Correct.**
Q. **And so, if you go down -- well, on the right-hand side, where it says, "Miss Chalinor?"**
A. **Yes.**
Q. **About halfway through.**
Would you read that sentence.
A. **Which sentence? The one with the --**
Q. **"Miss Chalinor reported Mr. Burke will not admit."**
A. **Okay.**
11:14AM
Miss Chalinor -- yes, "Miss Chalinor reported Mr. Burke will not admit to being mentally ill, but she wondered if he was hearing voices, due to his strange grimace."
Q. **Okay.**
In -- if you would then go to page 13. In the second paragraph there.

THE COURT: What about it?

BY MR. SCHWEDA:

Q. **He was, Mr. Burke was hospitalized again at Sacred Heart, at age 13, in 2001, correct?**

A. **Yes.**

Q. **And he was paranoid and endorsed auditory hallucinations, according to the records you reviewed, correct?**

A. **Yes.**

Q. **Go to page, bottom of page 14.**

11:15AM **And in reviewing his Presentence Investigation Report you saw that he had received services at Spokane Mental Health in 2004, correct?**

A. **Yes.**

Q. **And if you go to page 15.**

The second to last sentence says, "The case manager at Spokane Mental Health noted Mr. Burke was becoming increasingly delusional, believing the case manager and Mr. Garver were conspiring against him."

A. **Yes.**

11:16AM Q. **So, wouldn't it be delusional to be at Western State Hospital and thinking that you're going to get out?**

A. **Not necessarily.**

Q. **On page 15, in the third paragraph.**

It's true that Mr. Burke was released from his involuntary commitment at Sacred Heart Hospital to a place

called McGraw, in September of 2004.

Correct?

A. That is what I wrote, yes.

Q. And he stayed there until February of 2005.

A. Yes.

Q. And then would you read that next sentence?

THE COURT: I'm not sure where you are, counsel.

MR. SCHWEDA: In the third paragraph, on page 15, Your Honor.

11:17AM THE COURT: Sure.

If you're trying to elicit that he used the word, "delusional thoughts," why don't you just do that.

I'm trying to enlist your aid in, in aid of your point of view. Which is, there's some references to delusions in the 2007 report.

So, if, if you, if you do it in a direct fashion, it would be efficient.

MR. SCHWEDA: I'll try to do the best I can.

THE COURT: Okay. I appreciate your efforts in that 11:17AM regard and I certainly know you do that.

Doctor Low, in page 15, in that paragraph beginning, "Mr. Burke," did he endorse that he was, he was, he felt he was going to McGraw because he had delusional thoughts in part?

THE WITNESS: He felt he was sent there for perseveration delusional thoughts.

THE COURT: Okay.

Go ahead, counsel.

BY MR. SCHWEDA:

Q. And he also, he's reporting, or it's reported that that's when he's not on medications, correct?

THE COURT: That's correct.

THE WITNESS: Yes.

BY MR. SCHWEDA:

Q. And, in fact, when you did your testing --

11:18AM THE COURT: Excuse me, counsel.

In that same paragraph, did he deny being delusional, but expressed that he had concentration difficulties? In the next sentence? "He denied being delusional, but had concentration difficulties."

Do you see that sentence?

MR. SCHWEDA: I'm waiting for you to respond to the Judge's question.

THE WITNESS: I'm sorry, I thought you were -- yes, I do see that sentence.

11:19AM THE COURT: Go ahead.

BY MR. SCHWEDA:

Q. And then the next sentence says that his mother reported her son had both visual and auditory hallucinations when unmedicated. Which the defendant denied.

A. Yes.

Q. **And, in fact, when you did your testing in June and July of 2016, Mr. Burke was, when you did your testing, he was on 20 milligrams a day of Zyprexa, correct?**

A. **Yes.**

Q. **And, in fact, before that, when he had been at the Spokane County Jail, he was on 40 milligrams a day Zyprexa.**

Did you know that?

A. **I think so, but his dosage was also increased to 40 milligrams a day at our facility.**

11:20AM Q. **Okay.**

But does Zyprexa, that's something that calms him down and prevents the psychosis, correct?

A. **It's an antipsychotic medication, so it, it can help with voices, with delusions, and it has a very sedating quality to it.**

Q. **Okay.**

And so, when you're doing some of your testing, he's only on 20 milligrams. He's been, his medication has been reduced, correct?

11:20AM A. **I would have to check and see at what date he started the new medication, compared to the time that I actually tested him. So I can't answer that for sure.**

Q. **Okay.**

So, if we --

MR. SCHWEDA: If I may, Your Honor, grab -- oh --

BY MR. SCHWEDA:

Q. **Do you know who Doctor Hugh Grant is?**

A. **Doctor who?**

Q. **Hugh Grant.**

A. **I don't believe -- that name is not striking me.**

Q. **Okay. He's a psychiatrist that saw Mr. Burke on June 22nd of 2016.**

A. **No, that would be Doctor Grant Haven.**

Q. **Okay. Excuse me, Grant Haven.**

11:21AM A. **Yes.**

Q. **And he's the doctor that increased his dosage of his Zyprexa, correct?**

A. **Yes, on June 22nd, 2016.**

Q. **Okay.**

And so some of your testing was, had already been done at that point, correct?

A. **No. The testing did not start until June 29th. According to my records.**

Q. **Okay.**

11:22AM **Now when you -- Zyprexa, it takes a while for Zyprexa to take effect, full effect, correct?**

A. **I don't know how to answer that question because, A, I'm not a pharmacologist or pharmacist, but, secondly, he was already taking 20 milligrams, and then it was increased.**

So I don't know how long that would take for an

increase to show its effects, versus if somebody were not taking any medications at all and was starting on something.

Q. But you would agree that if we were going to start someone on Zyprexa, it takes awhile for it to take its full effect?

A. If they were on nothing, certainly.

Q. Okay.

And what would be a range of time that you would expect the Zyprexa to take effect?

A. We usually tell people three to four weeks to really see

11:22AM effects of any psychotropic medication.

Q. And so here, Doctor Haven increased the dosage of Zyprexa, because he felt Mr. Burke needed it, correct?

A. He increase the defendant because Mr. Burke requested it.

Q. Well, he wouldn't have done it if he didn't think that Mr. Burke needed it, correct?

A. Well, oh, yes, he felt that Mr. Burke needed it, too. But Mr. Burke also requested the increase.

Q. Okay.

So your testing takes place before the three to four

11:23AM weeks that we would expect the increased dosage to get to its optimal level, correct?

MS. VAN MARTER: Your Honor, I'm going to object.

That mischaracterizes the testimony. She specifically testified that she cannot provide an opinion as to what length of time. She's not a pharmacologist.

And given that he was on the medication previously, that's not an opinion she can render.

THE COURT: She can answer, if she can.

THE WITNESS: I can't answer that question, because I don't know.

I don't think it would take that long for an increase to, to effect itself, but I really don't know.

BY MR. SCHWEDA:

Q. **All right.**

11:23AM **And then if we would go back to exhibit 107, which is your 2007 report.**

On page 16, in the second to the last paragraph?

A. **Yes.**

Q. **This is 2006.**

And Mr. Burke is, again, involuntarily committed at Sacred Heart Hospital, correct?

A. **Yes.**

Q. **And in the middle of the paragraph it states, "No psychotic symptoms were observed, but some staff suspected he was**

11:24AM **responding to internal stimuli."**

A. **Yes.**

Q. **And so, when, would you take that indication from the staff at Sacred Heart to mean that he's having some kind of auditory hallucinations?**

A. **It could.**

Q. **If you are having auditory hallucinations and responding to them, what we would see that person doing is responding to internal stimuli, correct?**
A. **Yes, that would be an example of such.**
Q. **And if you go to page 16 of your report, at the bottom.**
It states that Mr. Burke was hospitalized at Eastern State Hospital in 2006, for a 90-day commitment, as gravely disabled, correct?
A. **Yes.**
11:25AM Q. **It says that he was an unreliable historian, who minimized and excused his behavior, correct?**
A. **Yes.**
Q. **On page 17, it indicates that Eastern State Hospital staff had talked to the defendant's mother, Mrs. Garver, correct?**
A. **Yes.**
Q. **And she reported he saw monsters, he saw, he saw people, he woke up in the middle of the night screaming.**
A. **Yes.**
Q. **And if you go to page 18 --**
11:26AM **MS. VAN MARTER: Your Honor, I'm just going to renew my objection for relevance. I understand we're going through a historical --**
THE COURT: No, I'm going to give counsel some latitude. He has a theory and he's entitled to pursue it by showing a history of, of an infant waking up in the middle of

the night, worried about monsters and other such things.

Okay. Go ahead.

MR. SCHWEDA: Thank you, Your Honor.

BY MR. SCHWEDA:

Q. At the bottom of page 18, you, you interviewed Taldja T A L D J A, Garver, the defendant's mother, correct?

A. Yes, I did.

Q. And she reported, at the bottom of page 18, that, at age five or six, Mr. Burke began to exhibit signs of mental illness.

11:27AM A. Yes.

Q. She reported that he woke up in the middle of the night, claiming he saw things.

A. Yes.

Q. And she denied that these were nightmares. Stating that he was fully awake and was pointing at what he saw, the people, the monsters.

A. Yes. That is what she reported.

Q. And that, at age 13 or 14, he told his mother that he saw and heard things.

11:27AM A. Yes.

Q. And on page 18, he said he told his mother that the voices were telling him to stab his younger brother?

A. Yes.

Q. And that Mr. Burke stopped confiding in her, because Mrs. Burke, or Mrs. Garver had told the doctor about this.

A. **Correct.**

(Pause.)

THE COURT: Counsel?

MR. SCHWEDA: I'm proceeding, Your Honor. I'm just trying to get organized here. Just take me a second. Thank you.

BY MR. SCHWEDA:

Q. **I'm going to leave that report now, Doctor, and go on to the M-FAST.**

11:28AM **Which, correct me if I'm wrong, it's the Miller Forensic Assessment of Symptoms.**

A. **Yes.**

Q. **And --**

A. **Yes.**

Q. **And it's, you indicated it's a screening vehicle. Correct?**

A. **Yes, it is.**

Q. **And so what you're trying to determine is, it's a screen to try to determine if someone is malingering?**

A. **If somebody is feigning psychotic symptoms.**

11:29AM Q. **Well, feigning is different than malingering, right?**

A. **Malingering has the component of a secondary gain to it. So, yes, there are some slight differences.**

Q. **Okay.**

And so you're saying that the, his description of hallucinations is intentionally exaggerating them.

A. **Yes, I'm saying he's exaggerating them, not completely making it all up.**
Q. **But he has this history of having hallucinations, correct?**
A. **Yes.**
Q. **And so you're using the M-FAST to try to screen on whether he's malingering.**
A. **Yes.**
Q. **But you know he's had hallucinations, so we know he has a history of that, a long history of that.**
11:30AM A. **Yes.**
Q. **And, in fact, up to this point, not only what I've gone through here, but numerous doctors at Western State Hospital have determined that Mr. Burke is psychotic, he didn't have the ability to assist in his own defense, correct?**
A. **With regard to the murder charge that was dropped, yes.**
Q. **Yes.**
And so, when you gave the M-FAST, he scored an eight, correct?
A. **Yes.**
11:30AM Q. **How many questions are there on the M-FAST?**
A. **If you'll give me a moment I can look. There are 25 questions.**
Q. **And at what point, what's the cutoff to saying you're not malingering to now you're screened to be a malingerer?**
A. **The manual suggests a cutoff of six.**

Q. **Isn't there some later research that indicates that the cutoff should really be an eight?**
A. **I'm not familiar with that specific research, but, yes, I have heard that in some samples that six could be too low.**
Q. **And would that be samples of people that have a long history of psychosis?**
A. **It could be.**
Q. **And here he scored an eight, correct?**
A. **Yes.**
11:31AM Q. **Which, if this other body of opinion is correct, he wouldn't have been, he would have passed the M-FAST test, correct? He would have been right at the cutoff point.**
A. **On this particular test, yes, some people could certainly come to that conclusion.**
Q. **And one of the questions that you asked him, one of the questions on the M-FAST test is, I often find myself not being able to sit still in a chair.**
A. **Yes.**
Q. **And he said, false.**
11:32AM A. **Yes.**
Q. **And that got, and the test says that you're supposed to observe if the individual's report is consistent with his behavior.**
A. **Correct.**
Q. **And you, you gave him a one for that, saying that it, that**

he was not able to sit still in a chair. Or, excuse me, that he was able to sit still, still. You tell me how you scored that.
A. Well, he answered, false, and then he said, both.
So, I scored him as being inconsistent, as his report's being inconsistent with his behavior.
Q. Okay.
So, because he was inconsistent, you gave him a one on that?
A. Yes.
11:33AM Q. And so that's really a judgment call, correct?
A. Well, it's a judgment call for people who have had the opportunity to observe a person's behavior.
If you don't know a person well, have not met with them very often, it would be hard to score these sorts of questions.
Q. Okay.
Well, you met with him in 2007.
A. Yes, well, and I met with him plenty of times during the current evaluation, so I felt I had enough information to --
11:33AM Q. Okay.
But my question was, you met with him in 2007.
A. Yes.
Q. And spent considerable, significant time with him then.
A. Yes.
Q. And you met with him in 2016 and spent significant time

with him then.
A. Yes.
Q. And so it's really a judgment call on whether he can sit still and whether his answer is true or not, correct?
A. No, it's based on observed behavior.
Q. But aren't you, you're observing whether his answer is correct or not. And that's how your, that's how you score it, correct?
THE COURT: Well, I thought you were asking if she was observing his behavior and then you switched to behavior or to observing his test result.
So which is it? Or is it both?
Because she's scored it after looking at his answer and observing his behavior. That's what I understand, Mr. Schweda.
BY MR. SCHWEDA:
Q. Is that correct?
A. Yes, what the Judge said is correct.
Q. And that's really a judgment call.
A. No, because I can compare his actual behavior to his actual reports.
Q. But you're making a judgment about his actual behavior, correct?
A. I --
THE COURT: Counsel, you're quibbling about the

difference between judgment and observation and she said she made the observation. That's a percipient event.

So, go ahead.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

Q. One of the other questions on the test is, I experience hallucinations that last for days.

A. Yes.

Q. And he said, he answered, true, and said, and you indicated in quotation marks, "definitely true."

11:35AM

A. That was his answer, "definitely true."

Q. And so you gave him another point here that gets him to the eight, correct?

A. That's how the test is scored, correct.

Q. But he has a history of hallucinations.

A. That's not the question.

The question in the test is, I experience hallucinations that last continually for days.

That's qualitatively different from simply having a history of hallucinations.

11:35AM

Q. So, the, you're going strictly by the book then. If the test says -- if you say it's true, you get a one, a one point, even if the person has a long history of hallucinations.

A. I'm scoring the test the way that it's standardized and that is the proper way to score the test.

Q. **Okay.**

So, if you scored it and knew about his history, wouldn't that raise any questions in your mind as to whether you should do some additional testing after the M-FAST?

A. **No.**

As I said, we read the questions exactly as posed, because that is the way the test was standardized and validated.

I took into consideration his history and that's why I diagnosed him with schizophrenia.

11:36AM Q. **But the, you've, you agree that the M-FAST is just a screening tool.**

A. **Yes.**

Q. **It's not a diagnostic tool.**

A. **It's a screening tool.**

But the only other diagnostic test available, the SIRS-2, is not a valid measure, so I really wasn't, I had nothing else to go to.

Q. **Okay.**

Another question on the M-FAST was, often I get the

11:36AM **strange feeling that I can, that I, that I am from another planet. And he answered, true.**

And that got him another --

A. **Yes.**

Q. **-- point on the M-FAST, correct?**

A. **Yes.**

Q. **But he's reported for a long time that he feels that there's this alternate universe that he, he's a part of, correct?**

A. **Correct.**

Q. **Another question on the test is, when I hear voices, I often develop fears of leaving my house or room. And he reported, sometimes.**

And that got him another score to make him a malingerer, correct?

11:37AM A. **It added another point onto his total score, yes.**

Q. **And, but the records are replete with, he stays in his room, he's seclusive, he doesn't come out, he's observed in his, in seclusion, responding to internal stimuli.**

So, wouldn't that be, wouldn't that validate that that isn't a sign of malingering, but that's actually the history of Mr. Burke?

A. **No, that's totally separate from what the question is asking.**

The question is asking, when I hear voices, I often

11:37AM **develop fears of leaving my house or room.**

That's not, necessarily, the same as these other behavioral observations you just mentioned.

Q. **Okay.**

So, the SIRS-2, and that's, S I R S -2, is the Structured Interview of Reported Symptoms, correct?

A. **Yes.**
Q. **And it's actually meant to be the diagnostic tool that you would use after screening under the M-FAST, correct?**
A. **Yes, it would be.**
Q. **And, but you think that there's some opinions that this is not a valid test any longer?**
A. **I know that there are some definite opinions that it's not, not a good test to use.**
Q. **Okay.**
11:38AM **You think that there's a proportion of the clinical psychology community that would still endorse using the SIRS-2?**
A. **I don't know. I haven't spoken to anybody who has debated about that or would say that they would continue to use it, with all of this information that's out there.**
Q. **And that the SIRS-2 has eight scales, correct?**
A. **Yes.**
Q. **And do you know what the scales are, offhand?**
A. **Not all of them, off the top of my head. I don't have it in front of me.**
11:39AM Q. **Well, it's on page 24 of Doctor Brown's report. Which is in your tab 13. Would you go to that page.**
A. **Okay, I'm there.**
Q. **So, about in the middle of that page, the sentence starts out, the SIRS-2 has eight primary scales.**
A. **Yes.**

Q. **None of which were elevated on Mr. Burke's interview profile.**
A. **Yes, I see where it says that.**
Q. **And then would you go through and tell us what the different scales are and how Mr. Burke scored on Doctor Brown's test?**
A. **Well, she says that he scored a one on rare symptoms. Zero on symptom combination. Zero on improbable or observed symptoms. Eight on blatant symptoms. Six on subtle symptoms.** 11:40AM **13 on selectivity of symptoms. Six, severity of symptoms. Zero reported versus observed symptoms.**
Q. **So he passed the test.**
A. **Well, she is saying that these were not elevated.**
Q. **Correct. And so --**
A. **So --**
Q. **-- so to, if they were elevated, that would be evidence of malingering, correct?**
A. **Well, I would have to see the profile, because she also doesn't reference the decision tree that is supposed to be used** 11:40AM **in coming up with the final conclusion.**

I have not seen SIRS-2 reports or SIRS results reported in such a manner before, so it's hard to make that opinion, without seeing the actual profile and the protocol.
Q. **Okay.**

So, the last sentence of Doctor Brown's report

indicates, these scores are not indicative of someone feigning psychosis?
A. That is what she writes, yes.
Q. But you disagree with that?
A. No, I didn't say that.
I said that I would like to see the profile. But again, putting all that aside, I don't even think this is a valid test to use for psychosis. So, I wouldn't even look at that, in general. Or -- excuse me -- not a valid test for malingering of psychosis.
11:41AM
THE COURT: Excuse me.
Just so the record's clear, less there be some parsing of part of what the doctor said, I understand the doctor to say, in response to your questions, that she, that this is not a standard, not a standard subtest and not a standard scoring of that test. When it was used before, it was contraindicated by virtue of a sampling error that was raised at a conference that she was at.
That's what I understand her testimony to be.
11:42AM
Not that she agrees with it in any way.
Do you understand it to be that?
MR. SCHWEDA: Correct, Your Honor.
And, and Doctor Brown will address this very issue and --
THE COURT: Yeah, I just wanted the record to be

clear, that's all.

Go ahead.

BY MR. SCHWEDA:

Q. In your direct examination, you referenced a Doctor Gallagher at Western State Hospital.

A. Yes.

Q. And she recommended that Mr. Burke be tested for malingering, correct?

A. Yes.

11:43AM Q. But that was never done.

A. As far as I know it didn't seem like it had been done.

Q. And so there's no evidence, no testing evidence from Western State Hospital, that said Mr. Burke was malingering.

A. No formal testing, correct.

Q. You've indicated that Mr. Burke understands enough about the legal process to be competent to assist his counsel and understand the peril he's in, correct?

A. Yes.

Q. But isn't that impeached by statements like, I thought I

11:43AM could go home?

A. He did not say that to me, that was what he said at Western State Hospital.

Q. Okay.

But wouldn't that be evidence of someone who doesn't understand the legal process, has no conception of that he --

THE COURT: No, no, no. One question at a time. So what is the question?

THE WITNESS: Would you repeat it.

THE COURT: No, no, excuse me.

What's the question?

BY MR. SCHWEDA:

Q. The first question is, isn't that evidence of someone who doesn't understand the legal process?

A. Not necessarily.

11:44AM Q. But he, there wasn't any way he's going home, is there?

A. I don't know. I don't know the laws about civil commitment and going home.

Q. Isn't his statements, I'm ready to be on the street, delusional, when you look at what he's there for --

A. Not necessarily.

Q. -- and his symptoms he's having?

A. Not necessarily.

Q. You indicated that he's goal-oriented and that makes him competent.

11:45AM But the goal that you stated was that he wanted to leave the hospital. And that isn't, that's not realistic, is it?

A. Can you tell me where you're referring to?

Q. Well, at that point, we were on page 18 of the, of your report.

THE COURT: Of what?
MR. SCHWEDA: Page 18 of Doctor Low's report.
THE COURT: Okay.
MS. VAN MARTER: Of which one, just for the record?
MR. SCHWEDA: Pardon?
MS. VAN MARTER: You've gone back and forth between the 2007 and the --
MR. SCHWEDA: Yeah, this is the 2016.
MS. VAN MARTER: Oh, so government's exhibit 1?
11:45AM MR. SCHWEDA: Correct.
Actually, I believe it's exhibit 2.
THE COURT: Okay, so we're talking about exhibit 2. What page, page 18?
MR. SCHWEDA: Correct, Your Honor.
THE COURT: Okay. What paragraph?
MS. VAN MARTER: It's actually exhibit 1, Your Honor. Her CV is exhibit 2.
THE COURT: I apologize, exhibit 1. So, what paragraph, Mr. Schweda?
11:46AM MR. SCHWEDA: The last paragraph.
THE COURT: Last paragraph. Beginning, on October 31st?
MR. SCHWEDA: No, page 18.
THE COURT: That's what I'm on.
So I'm using ECF 250. Are you, does your document

have ECF 250 at the top of it?

MR. SCHWEDA: No, it has ECF 231.

THE COURT: Okay, then let me get there.

MR. SCHWEDA: This is the government's --

THE COURT: I'm going to be using -- the one I'm using -- so tell me what paragraph you're on and go ahead.

I have her report, it's the one that's ECF 250.

MR. SCHWEDA: I believe ECF 250 is Doctor Brown's report. And I'm referring to Doctor Low's report.

11:46AM THE COURT: Is it? Oh, okay.

MR. SCHWEDA: And Doctor Low's report is not in the exhibit, my exhibit binder, it's the government's.

THE COURT: 231 is. I have it.

Thank you for that.

MR. SCHWEDA: Okay.

THE COURT: Page 18. Thanks.

BY MR. SCHWEDA:

Q. So, at the bottom of the last paragraph, on February 12th of 2016, he stated, I'm ready to be on the streets.

11:47AM A. Well, first of all, he was at Western State Hospital when he made this statement. This was not part of my direct competency evaluation of him.

So, we weren't talking about him being ready for the streets, because that had no bearing on his supervised release violations that we were addressing.

Q. **But we're talking about whether he's psychotic or whether he's malingering, correct?**

A. **In terms of diagnosis, yes. But this doesn't relate specifically to the issue of competency that was at hand when I evaluated him.**

THE COURT: Okay, just so we're all on the same page.

The terms are being thrown around, like whether he's psychotic or malingering, and I don't understand that be to the issue.

11:48AM **The issue is, he can't have a, some sort of a diagnosis of a psychosis, like schizophrenia, if that's correct, and at the same time, with medication, he can be, he can be behaving in an acceptable way, and can, in fact, make judgments about what he will exaggerate or not.**

So, I don't see it as a choice between psychotic, meaning right now being psychotic, versus he has a history of some diagnosis of a mental, mental issue, mental illness.

So, mixing the terms doesn't help me very much as the decider. So, I would ask you to be as precise as you can in 11:48AM **using terms, okay?**

Thanks.

BY MR. SCHWEDA:

Q. **That statement, I know I'm ready to be on the streets, that's not realistic, is it?**

A. **It may not be realistic, but that doesn't mean that it's a**

psychotic statement either.
Q. But if, if you take that and put it in the context of being able to assist your attorney and appreciate what's going on in a courtroom, if that's unrealistic, then there, that person is not able to assist their attorney, they're not able to understand the proceedings against them, are they?
A. I disagree with that statement.
And, again, that statement was not made in the context of our current evaluation, so it really has no bearing upon anything.
Q. In your direct examination, when referring to the page 19, he, he was making, you testified that he made the statement that, when he absconded from the halfway house, he said the voices effect one part of his functioning, but not the other.
So, and he said it was the voices that made him abscond, correct?
A. He gave two different answers to the social worker.
So, as you can see in that last paragraph, on page 19, she pointed out, he absconded from parole while in the halfway house. He then claimed that he couldn't stay there because of the voices.
So, then the social worker addressed the concern about being discharged, when he's got active symptoms.
And then he kind of changed his story and said he didn't want to give the impression that the voices influenced

11:49AM
11:50AM

his decisions, but he actually willingly, knowingly, volitionally left and he knew he would be violating parole.

So -- and he, he changed his own story within that, that conversation with the social worker.

Q. So, it doesn't make much sense, does it, if he changes his story?

A. Yes, it does make sense.

Again, as I testified earlier, it's clear that his goal was to get out of the hospital, yet still evade criminal charges, by claiming that he was too impaired with his symptoms.

11:51AM

Q. On page 20.

In your direct examination, you stated that Mr. Burke let the staff know that he was ready to be released.

And let me preface this. This report that you're referring to here was done after Mr. Burke had eloped from the Western State Hospital, correct?

A. If you're referring to the release summary.

Q. Yes.

A. By Western State Hospital.

11:51AM

Yes, it was dated April 15th. And that was after he escaped.

Q. Okay.

So, this is a report done by the professionals at Western State Hospital, after they have had this problem with him leaving, correct?

A. **Yes.**
Q. **In his, in Mr. Burke's history, he's denied hearing voices, but then admitted hearing voices, correct?**
A. **Yes.**
Q. **And so the, is that part of his mental illness, that he will deny it and then admit it and then deny it and then admit it?**
A. **I'm not quite sure how to answer that. I think it's very common for patients with severe mental illness, in general, to deny being mentally ill, and I think that's what was going on in his younger years.**
Q. **When you were giving these tests, the PIA and the TOMM and the others, did Mr. Burke have the right to refuse to take those tests, in your mind?**
A. **Of course.**
Q. **Okay.**

And, in fact, the when Mr. Burke would say something outlandish, you would correct him, correct? And you would encourage him to take the testing.

11:53AM **MS. VAN MARTER: Objection, Your Honor.**

We have got multiple questions going on at the same time.

MR. SCHWEDA: Sorry.

THE COURT: Sustained.

BY MR. SCHWEDA:

Q. Did you have any arguments with Mr. Burke or discussions where --

THE COURT: No, no you need to rephrase, counsel.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

Q. Did you have any discussions with Mr. Burke where you corrected him?

A. Where I corrected him?

11:53AM Q. On factual statements.

A. I don't have any recollection of anything specific.

Q. Okay.

The --

MR. SCHWEDA: I don't have anything further, Your Honor.

THE COURT: Do you have any follow-up, Miss Van Marter?

MS. VAN MARTER: Your Honor, I'll keep this brief. The Court covered a few of my clarifying areas.

11:54AM

REDIRECT EXAMINATION

BY MS. VAN MARTER:

Q. Doctor Low, you were asked some questions about administering an IQ test back in 2007.

A. **Yes.**
Q. **Why did you administer the IQ test back in 2007 in that original, if you recall?**
A. **Back then I believe that was just, my standard practice was to give an IQ test and personality testing and anything else that was needed.**
THE COURT: Keep your voice up, please.
THE WITNESS: Yes, sir.
BY MS. VAN MARTER:
11:54AM Q. **And during the administration of that test, back in 2007, if you recall, was there any anything of concern to you regarding Mr. Burke taking that test?**
A. **Well, in reviewing my old report just now, yes, I noted many concerns about poor effort, where he actually referenced me to go back to the Eastern State Hospital testing, because he tried harder then.**
Q. **So why, in this particular case, relevant to today and the current evaluation in government's exhibit number 1, did you rely on the Eastern State Hospital IQ test?**
11:55AM A. **Because I believe that those are probably the most reliable reports that are out there of his IQ functioning.**
Q. **Okay.**
There's been lots of questions by Mr. Schweda about history of symptoms and hallucinations, comparative to the current testing that occurred here today.

Are you denying that Mr. Burke had a history of hallucinations?

A. **Absolutely not.**

Q. **Are you denying that Mr. Burke had a history of delusional behavior, reports of delusional behavior?**

A. **No.**

Q. **So, in this particular case, when you were also asked about the testing that you did, is that testing measured, intended to measure history of symptoms?**

11:56AM A. **No, testing done at any given time is supposed to measure the functioning right then.**

Q. **And so, all the questions about the consideration of history, had you considered all of the historical information in employing these actual tests, would that invalidate those results?**

A. **No.**

Q. **Okay.**

Explain the interaction between the two.

A. **I really don't see much interaction between the two, those** 11:56AM **personality tests. There are a lot of questions on these personality tests and they query into a person's history and all of their various symptoms, so that would have captured some of that.**

And again, the way these tests are administered, we have to give them in a standardized fashion, we can't just

arbitrarily change a meaning or interpretation, because then these tests would be completely useless.

Q. So, in this particular case, you were, the results that you provided were based upon the standardized testing, as you understand them, for those particular personality tests.

A. Yes.

Q. And, with respect to the significance in this particular case regarding Mr. Burke's discussion of his symptoms, you understand there's the history and then you have the current discussion.

11:57AM

What's the significance to you between the two?

And I think you were trying to provide an answer to Mr. Schweda during one of his questions.

A. Yes.

Again, there's no dispute that Mr. Burke has a pretty long-standing history of psychotic symptoms.

There's no dispute that he has schizophrenia or some sort of a thought disorder.

I think that what seems to be confusing here is that you, a person can have a bona fide mental illness and be exaggerating those symptoms at the same time.

11:57AM

They are not mutually exclusive.

Just because a person's mentally ill does not mean that there's no, no chance that they are not exaggerating.

Q. And in this particular case, your conclusion regarding Mr.

Burke was what, as to his symptoms?

A. **Was that he is exaggerating and malingering his symptoms.**

Q. **And again, as some of the questions eluded to, can you have hallucinations and still be competent?**

A. **Yes.**

Q. **And can you have delusions and still be competent?**

A. **Yes.**

Q. **Just a couple other quick questions.**

The M-FAST test. Did you base your diagnosis as to malingering, solely upon the M-FAST results?

A. **Absolutely not.**

Again, it was just one piece of many pieces of data that I used.

Q. **And those you previously testified to.**

A. **Correct.**

Q. **And there's some questions about medication.**

What impact, if any, does the level of his medication have on his testing?

A. **Well, that's hard to, that's really hard to answer.**

Again, I think Mr. Burke's medications are working pretty well, so, if anything, his thoughts are going to be more clearly organized, so he would be better able to participate in testing.

If I had someone who was really acutely psychotic, I'm not even going to give those tests, because I know they can't

participate in a meaningful way.
Q. And you, consistent with some of your other conclusions, Mr. Burke appeared to be able to carry on the conversations, interact with you, and carry on with the tests; is that correct?
A. Yes, that is correct.
Q. And is that then inconsistent with his self reports.
A. Yes.
Q. All right.
MS. VAN MARTER: If I could have a moment, Your Honor.
11:59AM (Pause.)
MS. VAN MARTER: Thank you, Doctor Low. I have no further questions.
THE COURT: Anything else, Mr. Schweda?
MR. SCHWEDA: No, Your Honor.
THE COURT: You may step down. Thank you.
THE WITNESS: Thank you.
THE COURT: Do you have any other witnesses?
MS. VAN MARTER: Not from the United States, Your Honor.
11:59AM THE COURT: Do you have any witnesses, Mr. Schweda?
MR. SCHWEDA: Yes, Your Honor. Doctor Brown.
THE COURT: Okay.
Doctor Brown.
(Pause.)
THE COURT: Let's see. Miss Vargas, would you police

this a little bit.

THE DEPUTY CLERK: I'm sorry, would I what?

THE COURT: There's a couple -- if you would remove that, please.

All right. Thank you.

Please raise your right hand.

WHEREUPON,

DEBRA BROWN

having been first duly sworn

testified as follows:

THE COURT: Good morning or good afternoon. Please be seated.

When you're comfortable -- watch your step getting into that chair -- and proceed to get your foot on there. Okay.

THE WITNESS: Yeah.

THE COURT: Go ahead.

THE WITNESS: Okay.

12:01PM THE COURT: The microphone should be on.

THE WITNESS: Yes.

THE COURT: Yes.

Tell us your first and last name and spell them both for the record. Thank you.

THE WITNESS: My name is Debra Brown. D E B R A.

Brown. B R O W N.

THE COURT: Okay.

And do you go by Doctor Brown?

THE WITNESS: I do.

THE COURT: Okay.

Doctor Brown, good afternoon.

Let's proceed.

DIRECT EXAMINATION

12:01PM

BY MR. SCHWEDA:

Q. Thank you, Your Honor.

Doctor, would you tell us a little bit about your education.

A. Yes.

I have a Bachelor's Degree, a BS degree in psychology from the University of Washington. I received that in 1988.

And a Master's Degree in psychology, clinical 12:01PM psychology, from California School of Professional Psychology in Berkeley in 1991.

Ph.D. in clinical psychology from the California School of Professional Psychology in Berkeley in 1997.

THE COURT: Okay.

BY MR. SCHWEDA:

Q. And what, tell us a little bit about your work history, experience in the psychology area.

A. Well, I think that the major ones that you would want to hear about is I had an APA internship in Spokane Mental Health. And that's how I came to Spokane.

I did some previous work as a psych assistant and different things like that before getting my Ph.D.

But then I, after that internship, I started working for the Asbell Professional Group. That's where I got my post-doc hours.

And then I started my own private practice called Brown and Associates.

And I have been working for myself since then.

THE COURT: When did you start your private practice, Doctor?

THE WITNESS: 1998.

THE COURT: So right after you got your Ph.D.?

THE WITNESS: Right after I was licensed.

12:03PM THE COURT: Okay. Thank you.

BY MR. SCHWEDA:

Q. And that was my next question.

Are you licensed to practice clinical psychology in the State of Washington?

A. I'm licensed to practice psychology in the state of

Washington. There isn't any differentiation --
Q. Okay.
A. -- in Washington state.
Q. And as you just indicated, that's been since 1998?
A. Correct.
Q. Is that correct?
A. Correct.
Q. Now --
A. Before -- I'm sorry -- before that I was licensed with my Master's Degree, not as a psychologist, but with a counseling, masters in counseling.
12:03PM
Q. All right.

Now, in front of you there should be a white binder. Could you turn to tab 13 or exhibit 113.

THE COURT: What's exhibit 113? That's previously been admitted, isn't it?

MR. SCHWEDA: Yes, this is Doctor Brown's report.

THE COURT: Okay.

So exhibit 113 previously admitted. Thank you.

12:04PM
BY MR. SCHWEDA:
Q. And if you would, page -- turn to -- well, page one.

I wanted you just to tell the Court what documents that you have reviewed for your testimony.

THE COURT: It's an exhibit and I've read the exhibit.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

Q. Then let me ask you, are there any other records that you have reviewed that are not disclosed in your report?

A. I tried to list them all.

I'm not sure if I have Doctor Low's reported data or her test, raw data, in there or not.

Q. Okay.

THE COURT: Well, the date of the report is November 14th, 2016, right?

12:05PM THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: Should be there.

THE COURT: And I know that we have had some interactions with attorneys on the issue of production of documentation and reports.

So the question here is, does this report, on pages one, two, and three, list all of the documents that you've considered? Is that what you're asking?

MR. SCHWEDA: Yes, Your Honor.

12:05PM THE COURT: All right. Does it?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. SCHWEDA:

Q. You did a history on Mr. Burke, correct?

A. I did.

Q. **Tell us, briefly, and I don't want you to repeat what's in your report, necessarily, but tell us about what your history, what you discovered by preparing your history.**
A. **Well, there, it was done in two different ways.**
I went through lots of records.
THE COURT: Feel comfortable, as I said to Doctor Low, to just address Mr. Schweda.
THE WITNESS: Okay.
THE COURT: And I'll listen along.
12:06PM **THE WITNESS: Okay.**
I did that in two different ways.
I went through as many records as I had and put together a history.
And I also did a clinical interview with Mr. Burke and asked him history then.
BY MR. SCHWEDA:
Q. **Okay.**
And can you highlight some of the more significant items of his history?
12:06PM A. **I --**
THE COURT: I don't think that -- please rephrase your question to be specific, so that you're phrasing it either in social terms, psychological terms, testing terms. Be specific as to what you want, because that's too broad a question.
And Doctor Brown reviewed so many documents, it would

help if you could phrase it in a way that directs her attention to what you actually want.

Thank you for your cooperation.

MR. SCHWEDA: Yes, certainly, Your Honor.

BY MR. SCHWEDA:

Q. Does Mr. Burke have a history of psychiatric problems?

A. He does.

And what was significant to me is that his psychiatric and behavioral problems started when he was extremely, very young.

12:07PM

His mother's reporting that he started having problems, I believe, at the age of three or four.

And then he started having psychiatric hospitalizations at the age of 11.

Psychotic symptoms have been described beginning around the age of 12 or 13 onward.

And he was found incompetent by several different clinicians, psychologists, and psychiatrists at Western State Hospital, over a period of a number of years.

12:08PM

And, as Doctor Low reported, he is still psychotic.

THE COURT: Doctor Brown, you use the word "found incompetent." Is that what they found?

THE WITNESS: Yes.

THE COURT: He was incompetent for what purposes?

THE WITNESS: To stand trial.

THE COURT: At 13 and 14?

THE WITNESS: No, I'm sorry, no.

THE COURT: Okay.

So you were talking about --

THE WITNESS: The recent, the recent Western State hospitalization.

THE COURT: Okay. Now I understand where you are. Okay. Thank you.

BY MR. SCHWEDA:

12:08PM Q. Did you review any of the videotape of Doctor Low engaging with Mr. Burke?

A. I did.

Q. And was there anything significant in reviewing those tapes, to you?

A. Well, there were a couple things.

Mr. Burke was considerably disheveled and became more so over time.

I believe until around July 6th, I think the last video that I watched, where he had, finally had, someone had cut 12:09PM his hair and so he looked more clean and less disheveled.

He did not want to do any testing. He repeated that several times.

And Doctor Low told him that he had to.

I, I kind of question that or I wondered about it.

There was a point where she told him, well, we can

either do some testing today or you can talk to me.

He had wanted to go back to his cell, I believe. And he didn't want to do any testing.

And so, they talked and he answered questions that day.

There weren't any video, I didn't see any videos of the testing.

I'm not sure that -- well, I know not everything was taped, because the order to videotape wasn't in place when some of the discussions started, that I understand. And, of course --

THE COURT: I'm not sure what you mean by that.

Is there some issue that about the videotaping, Mr. Schweda? Because there was none raised by you.

MR. SCHWEDA: No, we're, --

THE COURT: And I recall no such motion, except the one that granted it.

MR. SCHWEDA: Correct.

THE COURT: That it be granted of the interviews, correct?

MR. SCHWEDA: Correct, Your Honor.

THE COURT: Okay.

Is there some defect in that that I should --

MR. SCHWEDA: No, no.

THE COURT: Okay.

MR. SCHWEDA: And I don't think that Doctor Brown was going to get into any more than what she said.

THE COURT: Really? That's what I thought she was saying.

Go ahead.

THE WITNESS: Well, I understand that there were some interviews that were done before the court order was issued. And those weren't taped.

MR. SCHWEDA: Correct.

12:11PM **And I, and I think that Doctor Low's report reflects that, Your Honor.**

THE COURT: Okay.

BY MR. SCHWEDA:

Q. **How did Mr. Brown and Doctor Low get along, as far as developing a rapport?**

A. **Mr. Burke?**

Q. **Or excuse me, Mr. Burke.**

A. **I think that they got along fairly, fairly well.**

THE COURT: Excuse me one second, Doctor.

12:11PM **The probation officer on this file has been stuck in Yakima, because of snow conditions in Eastern Washington, and he's been participating by video.**

He is headquartered here in Spokane, and would like to start driving back.

I don't anticipate the need for his testimony today in

a competency hearing, so I'm going to permit that, unless either counsel have an objection.

MS. VAN MARTER: We would concur, Your Honor. No objection.

MR. SCHWEDA: No objection, Your Honor.

THE COURT: Mr. Moore, you're excused, thank you. We'll see you next Friday.

MR. MOORE: Thank you, Your Honor.

THE COURT: Yes.

12:12PM You may proceed. Sorry for the interruption.

BY MR. SCHWEDA:

Q. Go ahead.

A. Could I have the --

Q. We were talking about --

A. I need, I need the question repeated.

Q. Yeah.

Well, we were discussing if Doctor Low, what kind of a rapport she developed with Mr. Burke, in the interviews that you witnessed.

12:12PM A. I think that they had relatively good rapport.

There were times when they disagreed with each other and went back and forth about a couple things.

Part of it being Mr. Burke's not wanting to do any testing.

And again, I, like I said, I don't know what was

happening during the actual testing, because that wasn't videotaped.

Q. Was it to the extent that it might have affected Mr. Burke's doing the testing?

A. I think that's possible, but that's based upon what Mr. Burke told me when I met with him personally.

Q. And what did he tell you?

A. Well, he starts off right away telling me that Doctor Low was, it, her questioning was, or that her report was wrong and that she had known him from before, and that was wrong, and that she had already made up her mind.

And so, this was his reasoning, that their rapport wasn't as good as he would have liked it.

Q. Okay.

So, his position was that he didn't think he was going to get a fair deal from Doctor Low?

THE COURT: Well you, this is your witness, so --

MR. SCHWEDA: Pardon me?

THE COURT: You need to let her testify.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

Q. Go ahead. Go ahead.

A. It was, it was my impression that --

THE COURT: There's no question for her to actually answer, so you need to rephrase your question.

MR. SCHWEDA: Okay.
BY MR. SCHWEDA:
Q. Was he suspicious of Doctor Low?
A. Yes.
Q. Was he suspicious of her motivations in preparing a report?
A. Yes.
Q. Can you explain that?
A. I --
THE COURT: Could I, could you reference the report, so I could read that.
12:14PM
MR. SCHWEDA: I don't believe it's in the report, Your Honor.
THE COURT: I'm sorry? What page?
MR. SCHWEDA: I don't believe it's in the report.
THE COURT: Oh, it's not in the report? Is it in the report?
THE WITNESS: I think that there's some of it, yes.
MR. SCHWEDA: If you could find it, Doctor.
THE COURT: I just wanted to have a written, so I could review her position and her interview with Mr. Burke on that point.
12:15PM
THE WITNESS: Oh.
THE COURT: So, on page 19 it starts in her report, dated August 18 -- and you're referring to Doctor Low's report?
THE WITNESS: There we go. I'm --

THE COURT: That's page 19.

So that's the first reference I have to it.

THE WITNESS: I have, on page 20, of that report --

THE COURT: Right.

THE WITNESS: -- on the, in the second paragraph, under the heading of clinical interview and behavioral observations, Mr. Burke began talking to me with the statement of, the other report is wrong, I'm mentally ill.

Stating that perhaps she had interpreted his bad mood as him not wanting to participate.

And stating, isn't everyone's psychosis different.

He felt Doctor Low didn't listen to me and she had an opinion from before I started to hear voices.

THE COURT: So that's what you're referencing?

THE WITNESS: Yes.

THE COURT: Okay. Thank you.

BY MR. SCHWEDA:

Q. Do you think that that had any effect on some of the testing that was done?

12:16PM THE COURT: Well, there's nothing in her report to effect, is there?

MR. SCHWEDA: Pardon?

THE COURT: Is there an opinion expressed in her report to that effect?

MR. SCHWEDA: No, but I'm asking her if that, that

question right now, Your Honor. Am I limited to --

THE COURT: Let me get this straight.

She issued a report. And there's nothing in the report that says that, but now, not having it in the report, you're asking her a question about whether on the basis of that paragraph, there was, in her opinion, an effect on the testing results?

MR. SCHWEDA: Well --

THE COURT: Isn't that your question?

12:17PM MR. SCHWEDA: Yeah, did -- well, let me ask, let me ask a question, if I may.

THE COURT: Go ahead.

BY MR. SCHWEDA:

Q. Do you, do you believe that that affected some or part of --

THE COURT: No, no. You need to be specific. That what?

MR. SCHWEDA: I'm, I will follow-up on what, after I'm just asking the --

12:17PM THE COURT: When you said, do you believe that, and I think "that" is undefined.

BY MR. SCHWEDA:

Q. Well, Mr. Burke's feelings, that he wasn't going to be treated fairly, did that affect --

THE COURT: No, no. That's not what it says. It says

that she didn't listen to me. It doesn't say anything about being treated unfairly. The report itself doesn't say that, Mr. Schweda.

MR. SCHWEDA: All right.

BY MR. SCHWEDA:

Q. Did the fact that she wouldn't, he expressed that she wouldn't listen to him, did that have any affect on the testing that Doctor Low performed?

A. It could.

12:18PM Q. Well, Doctor Low reported that he failed some of the tests, he didn't try on some tests.

A. Yes.

Q. Which ones, which ones did he not try on? According to Doctor Low.

A. Well, the results of the TOMM. And what Doctor Low explained, it doesn't look like he tried on that, giving just chance, answers that are chance.

And that, in her report, that she says that, on the MMPI, I believe, that he over endorsed and that was because he

12:18PM wasn't being cooperative, I believe.

Q. And how did you score those tests?

A. Well, I agree totally with Doctor Low on the TOMM.

And I agree that the MMPI-II is over reported. It's primarily inconsistent, the responses are inconsistent, as though he's not, that occurs when the answers aren't consistent

with one another.

So, his interest isn't there or he's or psychotic symptoms or something is making that not consistent. And it could be because he is just not being cooperative.

Q. But it could be because of he's hearing voices?

THE COURT: No, you need to ask her questions.

BY MR. SCHWEDA:

Q. It could also be because --

THE COURT: Now, counsel, in fairness to you, this, this is your witness.

So you can ask her, but you can't put words in her mouth.

So you can't tell her the answer and ask her to agree with you. And you know that.

So, please do that the way you know how to do it.

BY MR. SCHWEDA:

Q. Could -- could a mental disease or defect affect how he performed on these tests?

A. Yes, of course.

12:20PM I believe that Doctor Low just said that sometimes you don't give people tests, because you know they're so psychotic it won't come out appropriately or valid. And so, yes.

Q. Is that probable that that happened in this case?

A. It's possible.

Q. The --

THE COURT: Just so we're on the same page, I would expect you to elicit every opinion that's in her report as you judge necessary.

And if you're going to be trying to elicit opinions that she has not filed a report on, then I would have some concerns about that.

So, if you have some basis for doing it, that would be different, but I think it's important that we, that we, that the report, so -- both parties had a chance to prepare for this

12:21PM **hearing, and be adequately prepared -- my understanding was we were going to elicit testimony, based on the opinions expressed in the report about competency, and then impeach on the basis of history, other records, and the reports themselves, and the testing results. That's what I understood.**

MR. SCHWEDA: Okay.

So I'm going to change the way I order, this Your Honor.

BY MR. SCHWEDA:

Q. **If you would go to your report, Doctor Brown, at page**

12:21PM **three, under, it's under tab 13.**

MR. SCHWEDA: And I'm referring, Your Honor, to ECF number 251. It's in the, it's the last document in the binder that we handed up to the Court.

THE COURT: Okay. I have that.

MR. SCHWEDA: There was a, there was an, I believe,

ECF 251 was a, was one that we filed originally. Doctor Brown wanted to make some corrections, some spelling corrections, there was a redundant paragraph that was taken out, but, substantially, they're the same, but they're not, they're not exactly on the same pages.

THE COURT: Okay. I'll use 251.

MR. SCHWEDA: Okay.

Thank you, Your Honor.

BY MR. SCHWEDA:

12:22PM Q. **So, Doctor, in your review of the records, it, did it demonstrate that Mr. Burke has mental, a mental disease or defect?**

A. **Yes.**

Q. **And you've already indicated that he -- how does that manifest itself? Let me ask you that way.**

A. **Well, with the documents that I reviewed, it begins when he was 11 years old and he was went to Sacred Heart Medical Center and participated in the Behavioral Education Skills Training program. It's called BEST.**

12:23PM **Where, upon admission, he was, he was having problems. His mother reported that he had been abused, beginning when he was three years old, and that his stepfather had been rough with him.**

He was having trouble getting along with peers.

He was impulsive.

And he had poor coping skills.

He was in that program for two weeks. I believe it generally lasts six weeks. And he was discharged early, with a diagnosis of oppositional defiant disorder.

Q. **And then when was he again involuntarily committed to, to Sacred Heart Medical Center mental ward?**

A. **I believe he was admitted the next time, when he was 13, to Sacred Heart.**

Where he was diagnosed again with the oppositional defiant and a conduct disorder. After he had been threatening, making threats at school about shooting people and hurting people.

And also some preoccupations with chemical warfare and the government conspiracies. Concern by Spokane Mental Health Mary Kannegaard, who, who I know is a counselor that works actually at the school, at the various schools, from Spokane Mental Health.

And she was saying that he had numerous problems with authority, he was a loner, and he was externalizing blame for problems. That he had killed some, there was thought that he may have killed someone's cat.

He was tested during that hospitalization and found -- let me see -- that he was introversive, sexually uncomfortable, there was family discord, and anxious feelings.

He was put on some antipsychotic medication, hoping

12:24PM

that would control his behavior and his anger.
Q. Then he was, again, hospitalized at Sacred Heart in 2002; is that correct?
A. Yes, six months later he was hospitalized involuntarily again.
Q. And that's reflected in your report at the bottom of page four.
A. Page four, yes. Where he thought --
THE COURT: No, there's no question at this time.
12:25PM THE WITNESS: Oh, sorry.
THE COURT: So --
BY MR. SCHWEDA:
Q. Go ahead, tell us about that hospitalization.
THE COURT: Well, I'm not sure where we're going with this.
If there's a diagnosis at that hospital that's important to you, certainly the diagnosis would be helpful as a matter of history, unless you think there's something about the actual admission notes or other things that are going to help me
12:26PM make a decision, Mr. Schweda, about whether he's competent at this time, so --
MR. SCHWEDA: The --
BY MR. SCHWEDA:
Q. Was there any report of auditory hallucinations?
A. He had odd and unusual beliefs that reported that they were

bordering on psychosis.

And what they did, interestingly, was they diagnosed him with obsessive compulsive disorder and they did rule out diagnosis of schizoid and schizotypal disorders, which are personality disorders. Which is unusual, in that those types of diagnosis aren't generally given until after you're 18.

He was, I believe, 13 at the time. And so that's a little unusual.

BY MR. SCHWEDA:

12:27PM Q. To get it that early.

A. To get those types of diagnosis, absolutely.

Q. Okay.

He was then released to Excelsior, correct?

A. He was in Excelsior, but before that, I believe he went to the Crisis Residential Center, after he had run away from home.

He was having a lot of, a lot of behavior and psychological problems.

Q. So, on page five, you indicate that he was at the Crisis Residential Center after running away from home.

12:27PM And then a month later he was admitted to Excelsior, correct?

A. Yes.

Q. And what did the staff at Excelsior observe?

A. Well, he was tested by Doctor Kevin Heid and it was determined that he had a long history of peculiar behavior and

that they thought he, or Doctor Heid reported that he thought that he was in the process of developing a significant thought disorder, which is, is another way of describing psychosis.

They thought that the symptoms were more likely psychotic versus Asperger's or autistic type of symptoms.

He had different behaviors, to where it looked, they don't, they don't call it a multiple personality, but they say that, he's saying that he can be really cooperative and then in the next moment he can be really disruptive.

12:29PM And that looks like a cluster A personality disorder, which, again, are antisocial and some schizoid, schizotypal things.

Q. He then went to the Youth Care Center in Seattle; is that correct?

THE COURT: Counsel, this report is of record, it's admitted as an exhibit, and I've read it several times.

So, help me understand what we're doing and how you're approaching the subject. Because the report speaks for itself and it's already an exhibit.

12:29PM MR. SCHWEDA: Okay.

Well, I was going to approach it a different way, Your Honor, but you indicated you wanted to go by what was written in the report, so I was --

THE COURT: Well, help me understand where you're going, because this is, essentially, reading the report into the

record.

MR. SCHWEDA: And I'm not, and I don't want her to read the report, but I wanted to ask some questions.

But you indicated that I was limited to what was in the four corners of the report, so I'm --

THE COURT: No, no.

MR. SCHWEDA: -- following the Court's instruction.

THE COURT: Well, then tell me -- I'll listen to counsel.

12:30PM Help me understand what you think today's hearing is. Because I thought it was about competency.

What did you think?

MR. SCHWEDA: It is about competency.

THE COURT: So we were here to evaluate, under the particular statute, whether Mr. Burke is competent.

Isn't that what we're trying to do? Whether he's competent now?

MR. SCHWEDA: Correct, Your Honor.

THE COURT: Isn't that right?

12:30PM MR. SCHWEDA: Yes.

THE COURT: And that's why I thought the two examinations were done.

And if that's what we are here for, then that's the issue that I think I'm trying to decide, with the help of the two psychologists, who are here and who have rendered their

report.

So, if, if I'm wrong, Miss Van Marter, is there some other issue that we are here for that I'm overlooking?

MS. VAN MARTER: No, Your Honor, that is the sole issue.

And I, I would echo the Court's concerns. And I think the Court addressed this in a, in an ECF order, that that's the exclusive issue for today.

THE COURT: Well, then, what is it that you think we should be doing that we're not doing, Mr. Schweda?

12:30PM

MR. SCHWEDA: I think that the issue of Mr. Burke's competency is more nuanced than it being black and white.

I'm, and I'll, I'll cut to the chase on that part of it.

I want to go through some of the testing that was done, and then I'll, I'll get to the issue of competency.

THE COURT: Well, I've read the reports, as I said, several times. And I've listened to it.

And then I read her, Doctor Brown's ultimate opinions

12:31PM

on page 27, competency and then competency. On page 27 and page 28 of 251.

And isn't that what we are here about? Her opinions that are elicited?

MR. SCHWEDA: Um-hum. Yes.

THE COURT: And to the extent that there's some

support for those opinions, or support in the history or the tests that she administered, to determine competency at this time, right?

MR. SCHWEDA: Correct.

THE COURT: Okay.

Well, that, what time are we starting Rodriguez?

THE DEPUTY CLERK: 1 o'clock.

THE COURT: Okay.

We're going to start Rodriguez at 1 o'clock. And so we'll take an intermission at that time.

12:32PM

And we'll have a supervised release hearing in a different case, and so you folks can, will get some relief, and then we'll be back at quarter of two to finish up.

MS. VAN MARTER: Your Honor, if I could just inquire, on, along those lines.

The Court has pointed out the conclusion in Doctor Brown's report is, likewise, that Mr. Burke is competent.

THE COURT: Exactly.

MS. VAN MARTER: So my, my objection to Mr. Schweda's questioning is, we're outside of the report.

12:32PM

Is he now trying to claim that he is incompetent or is he agreeing with his own expert's opinion?

THE COURT: No, there's only, the only thing before me is the expert's opinion. That, that's what he's submitted, so that's what we are here for.

MS. VAN MARTER: I would, Judge, given some of his questions -- so he's not going to be presenting a different opinion than what is concluded in his own expert's report.

THE COURT: I -- Mr. Schweda?

MR. SCHWEDA: Well, let me ask some questions, Your Honor and --

THE COURT: No, no.

She asked the question and it's the right one. The questions today are, the opinions that the, that both sides prepared for, in the form of the report. None of which, one of which was supplemented, yours, Doctor Brown's, and those are the things that brought us here today.

I don't know of any other opinions that have been expressed by anybody.

And she's, and Miss Van Marter's simply saying, that's what we are here for, the opinions expressed.

And the answer is, I believe that to be correct.

Am I wrong in that, Mr. Schweda?

MR. SCHWEDA: Well, let me --

12:33PM **THE COURT: No, Mr. Schweda, just tell me if I'm wrong.**

MR. SCHWEDA: I think you're somewhat wrong, Your Honor.

THE COURT: How could I be wrong?

So -- tell me how I could be wrong, given the fact

that I've read the report several times.

MR. SCHWEDA: Well, the report starts out, on page one, basically, that says that he's currently charged with absconding.

Well, what I think that there's -- and I expect Doctor Brown to be different on and what she expresses the opinions in her report, is that he would be, he's competent to assist counsel and appreciate the --

THE COURT: I read the opinions. So -- I read them. I understand what her opinions are.

So, you're not, I don't know what you're trying to do, except to say she's, are those the violations that were alleged?

MR. SCHWEDA: There's, well, there's one that's absconding and there's one that relates to --

THE COURT: A commission of another crime.

MR. SCHWEDA: Yes.

THE COURT: Okay.

MR. SCHWEDA: And so she is clear that Mr. Burke can defend the absconding violation charge.

12:35PM She is not so clear that he can defend against a supervised release violation of committing another crime.

THE COURT: That's what her, that's what her opinions say.

MR. SCHWEDA: I -- well, I think you have to -- I don't -- I'll, I'm going to get to that, Your Honor.

I think that her opinion is, is that, if it gets to be more complicated than just --

THE COURT: I read her opinions, Mr. Schweda. I've just alluded to them. I read them repeatedly. So I know what they are.

So we are here for competency on the violations, to face the violations that are alleged.

So you can elicit the testimony about those, her opinions, as are expressed in the report.

12:35PM They weren't supplemented. Those are the opinions.

This is a competency hearing.

Is there something that you're going to elicit that's not in the report, that's a new opinion?

MR. SCHWEDA: I don't think it's a new opinion at all, Your Honor, I think it's in the report and --

THE COURT: Good.

Then, if it's in the report, let's get --

MR. SCHWEDA: And if you give me the opportunity, I'll develop it.

12:36PM THE COURT: Well, at some point, Doctor Brown's going to be asked about her opinions on competency and I, and I would anticipate that her opinions will be exactly as they're expressed in her report. That's what I would anticipate. Go ahead.

BY MR. SCHWEDA:

Q. **Is Mr. Burke competent to face a supervised release violation of absconding?**

A. **I believe that he's competent, yes, to participate fully in a simple hearing, trial.**

I think he is going to have difficulty, a lot of difficulty, with a more complex trial.

I am currently taking supervision from Patricia Zapf, who is a forensic psychologist, and just wrote Best Practices Modeled in Forensic Judicial Competency.

12:37PM

MR. OHMS: Your Honor, I'm going to object. This is not responsive to the question.

THE COURT: It's not responsive to the question.

Doctor Brown, the question was a simple one, and then you gave an opinion and that's it.

And nothing in the report references any other literature or that sort of thing, so...

BY MR. SCHWEDA:

Q. **What is your opinion based on?**

12:37PM

A. **My opinions are based on Best Practices Model For Judicial Competence, done by Patricia Zapf. And her supervision that, in competency evaluations, there are various types of competency --**

MR. OHMS: Your Honor, I'm going to object this information -- I'm objecting, this information's not in the expert's report.

THE COURT: I, that's -- it's not.

Mr. Schweda?

It's not in your report.

MR. SCHWEDA: I --

BY MR. SCHWEDA:

Q. **Is it in your report, Doctor Brown?**

A. **I was trying to explain why there is report of two different parts of the competency evaluation. That that is current best practices model in forensic psychology.**

12:38PM **And I made two -- in the report, I gave two opinions of competency.**

That Mr. Burke is competent to do a simple absconding trial. I think he could do that.

But something that is more complicated, where there is different testimony, where there is more evidence, where there is more scientific research, different, much more complicated case, I do not think he will be able to assist his attorney or testify relevantly or understand what people are saying.

BY MR. SCHWEDA:

12:39PM Q. **And would that go to the violation that alleges commission of a murder?**

A. **It would go to anything more complicated than a simple absconding plea.**

I think that's, I think that's a very simple, cut and dried.

Any charge that is more complicated than that, I think he's going, I don't think he's competent for.

And so I guess my answer is yes.

MR. SCHWEDA: May I proceed, Your Honor?

THE COURT: Sure.

BY MR. SCHWEDA:

Q. **So, what is, what, your opinion then, if it's more complicated, what's that based upon?**

A. **It's based upon the, the amount of rational understanding that an individual has to have to participate in something that's much more complex.**

Q. **And does Mr. Burke have that rational understanding for a more complex procedure?**

A. **I do not -- I don't think so.**

Q. **And what's that based upon?**

A. **His psychosis.**

Q. **And tell us about his psychosis and how that affects his ability to be rationally defend himself.**

A. **In my opinion, Mr. Burke's diagnosis is a schizoaffective disorder. That is a diagnosis where he has symptoms of hallucinations and delusions, but also the affective component, where there's also depression and some hypomanic, if not out right manic symptoms.**

And so he presents differently.

And I think that's being shown since he's about 13, 14

years old. Where he will have symptoms and then his symptoms seem to lessen.

He -- so I think the diagnosis are very complicated. He has had diagnosis all over the board.

I think the one thing that everyone agrees on is that he is psychotic and shows psychotic symptoms.

I believe that the testing I did is, was appropriate.

Q. Well, let's go to the testing.

Can you take us to your, where in your report you talk about the testing you did?

12:41PM

A. On page 24, under psychological competency testing.

Q. So let's, you, you gave Mr. Burke a SIRS-2, correct?

A. I did.

Q. And that was based upon Doctor Low's giving Mr. Burke the M-FAST screen, correct?

A. Yes.

The M-FAST is a screen. If one has questions as to whether or not the person is malingering, or not being truthful, then that is to be followed up by a structured interview.

12:42PM

The manual, in several places, suggests the SIRS and Patricia Zapf, again, one, if not -- she and Tom Grisso -- the top forensic psychologists in the country, told me, recommended, as I presented this case to her, under supervision, that that should be done.

I do not recall anything about the SIRS-2 not being

used and, in fact, it is the number one structured interview that is used, particularly in combination with the M-FAST.

Q. Now, let me ask you some questions about the M-FAST, preliminarily to your testimony on the SIRS testing.

The, you indicated that the M-FAST is a screening test --

A. Yes.

Q. -- correct?

A. Yes.

12:43PM Q. And it comprises of how many questions?

A. I believe it was 21. About 21 questions.

Q. And in order to come up to screen you as being a malingerer, the test requires you to come up with how many, he has to endorse how many of the questions that are asked?

A. In the M-FAST model, it suggests six.

More current research, particularly with individuals who are inpatient and psychotic, is eight.

I looked at the answers on Mr. Burke's test scores and there were some that I, the questions, the way he answered them, 12:44PM are consistent with his history.

And so, it does come up to a score of eight, but I think the research is showing that you cannot be malingering and still have a score of eight.

But, even so, to take a look at that, I did the SIRS. And with the SIRS, all of his scores are below the threshold of

malingering.

The SIRS is a much more in-depth, structured interview, which is better, of course, than a screen.

Q. And it has eight different scales; is that correct?

A. Um --

Q. I believe you list them on page 24 of your report.

A. Yes.

It has, it has eight primary scores. And it has a few other general scores.

12:45PM But he was underneath the malingering threshold on all of them.

Q. Okay.

Can you go through the eight different scales and just give a very brief description of what they are and --

A. He scored a one, which is supposed to be less than four, for rare symptoms.

He scored zero.

Q. Well, let me, what are rare symptoms?

A. Rare symptoms are, oh, I always see helicopters when I'm

12:46PM swimming. Something odd that is just kind of off the scale.

Certainly aliens and orbs, different colors, those aren't odd symptoms.

Q. Okay.

And then what's the next scale you report?

A. Odd symptom combinations.

That would be where the auditory hallucinations are interfering with the visual hallucinations that has to do with my delusion, okay? It would be a combination of a lot of symptoms.

Q. And how did he do there?

A. He got eight. That is supposed to be less than 10.

Oh, I'm sorry, he got zero, which is supposed to be less than 10.

Q. Or less than six, according to your report?

12:47PM A. Less than -- I'm sorry.

Q. And then the next scale was the improbable or absurd symptoms?

A. Improbable or absurd symptoms. Where he scored zero out of five.

Q. And what are -- I guess then that that implies that they're absurd symptoms?

A. Yes, like I see helicopters when I'm swimming.

Q. Okay.

A. Run, going through the water or something like that.

12:48PM Something just ridiculous.

Q. And then blatant symptoms?

A. He had eight. And it's supposed to be less than 10.

Q. And what are blatant symptoms?

A. Blatant are obvious symptoms. I hear voices. I see things.

Q. **And the next scale was subtle symptoms?**

A. **Subtle symptoms. He scored six. It's supposed to be less than 15.**

Those are more subtle symptoms, like low motivation, insomnia, hypersomnia, something like that. Selective symptoms. He scored 14 out of 17. I can't think of anything for that right now.

The severity of his symptoms. He scored six. One should score less than nine.

12:49PM **So he isn't describing anything more severely than other people who would be psychotic.**

He got zero out of less than six for reported symptoms versus observed symptoms.

On the supplementary scales, it showed that he was being honest, he wasn't defensive, his symptoms weren't overly specified, he wasn't trying to fail, and he was consistent.

It's a better test. It's a better, it's a better structure, it's a structured interview that is used more than any other structured interview for this type of thing in --

12:50PM Q. **Now, Doctor Low, her AXIS-I diagnosis was that he, well which diagnosis, which axis was the malingering?**

A. **Well, that's a little confusing, too. We don't use axis diagnoses any more. That went out with DSM-IV. We are now currently using DSM-V and there aren't any axis diagnoses. They're all one thing. Doctor Low diagnosed --**

THE COURT: She diagnosed 295.90, schizophrenia, multiple episodes, currently in partial remission. V 65.2, malingering. And 301.7, antisocial personality disorder. Based on the DSM-V.

THE WITNESS: That's right.

THE COURT: Page 26 of her report.

Mr. Schweda?

MR. SCHWEDA: So is --

THE COURT: Go ahead.

12:51PM **BY MR. SCHWEDA:**

Q. **Is malingering a diagnosis under the DSM-V?**

A. **Yes.**

Q. **And --**

THE COURT: It's a V scale.

THE WITNESS: It's a V.

THE COURT: It's a V scale. Not a diagnosis.

MR. SCHWEDA: Okay.

BY MR. SCHWEDA:

Q. **Do you agree with that --**

12:51PM **THE COURT: Is that correct.**

THE WITNESS: Well, I believe V codes are also diagnoses.

THE COURT: Well, it says V 65.2 and that's not a diagnosis as a V scale, is it?

THE WITNESS: It's a V code. It's a diagnostic code

that I'm --

THE COURT: It's coded as a V, a V code, though, not an axis. Isn't there a difference?

THE WITNESS: There aren't any axis diagnoses in DSM-V.

THE COURT: Okay.

Then I must, I must have an imperfect understanding. Go ahead.

BY MR. SCHWEDA:

12:52PM Q. Do you agree with that, that Mr. Burke is a malingerer?

A. I believe there are times when Mr. Burke denies or, and sometimes exaggerates symptoms.

I think he does that sometimes, because he wants to manipulate the situation.

I'm not sure I would go so far as saying that he's malingering, but I do believe that he feigns symptoms or denies symptoms and has done so since he was 11.

Q. How does that affect your opinions as to his ability, his competency to defend himself and assist counsel?

12:53PM A. Well, it's, it's going to make it difficult on the, on his defense attorney, certainly. Because it's going to be difficult to know when he's stating the truth.

Q. How would a psychologist understand that? When he's telling the truth?

A. What's very important for an individual to tell you the

truth is to have, it's called a therapeutic alliance or good rapport with the client.

You also want them to be stable. So, if they're stable on their medication, you're much more likely to get more accurate thought patterns and definitions and report of their symptoms.

Q. When Mr. Burke went to Sea-Tac to be tested or evaluated by Doctor Low, he was taking Zyprexa at the Spokane County Jail, correct?

12:54PM A. Yes.

Q. And what was his dosage at the jail?

A. He was receiving 40 milligrams a day.

Q. And when he arrived at Sea-Tac, was that changed?

A. Yes, they dropped it in half.

Q. And would that affect, affect his psychosis?

A. Yes.

Q. How would that affect his psychosis?

A. He's much more likely to have psychotic symptoms and be more confused.

12:55PM So, it's much more likely that he will start hallucinating and hearing auditory and seeing visual hallucinations and becoming confused.

Q. Is the reduction in the dosage significant, as to how Mr. Burke, Mr. Burke's psychosis?

A. Yes.

Q. **How so?**

A. **Well, I think -- while at Western State Hospital, he was there for a few years, and they worked very hard with Mr. Burke in trying to get his doses of appropriate medications correct.**

And I believe what they came up with, among other things, was this 40 milligrams of Zyprexa.

That was followed through at the jail, and I don't know why, I don't know, I have no idea why they dropped the dose when he went to Sea-Tac.

12:56PM Q. **And eventually they, Sea-Tac increased the dosage back to 40 milligrams, correct?**

A. **Yes.**

I'm not, again, I'm not exactly sure how that happened, other than during one of Doctor Low's interviews -- well, during all of them, Mr. Burke said that he was hallucinating and that he was having episodes or that he just had a psychotic episode and that he needed more Zyprexa.

And so Doctor Low made an appointment with the psychiatrist, but because of vacations and it was summertime, he

12:57PM **wasn't able to get in until July 22nd.**

Q. **I believe the record shows it's June 22nd.**

A. **June 22nd. I'm sorry.**

Q. **Okay.**

And --

A. **And --**

Q. **And that's when they increased his dosage again, correct?**
A. **Yes.**
There was a note in the, in the few -- I didn't get very many documents from Sea-Tac, but the one that I did get was from the psychiatrist, who said he was extremely schizophrenic and was having some very severe symptoms, and that that had occurred when his dose had been cut in half, which was when went to Sea-Tac. And that he was increasing that dose.
Q. **When you start or increase the dose from 20 milligrams to 40 milligrams, is there a period of time for that, that you have to wait before that becomes effective?**
A. **Of course.**
Q. **Tell us about that.**
A. **Psychotropic medications have to be processed through one's liver. It's not like taking aspirin that can pass through the blood brain barrier.**
I don't need to get into a lecture here, but it takes its time for it to process through the liver to be able to get into the brain for it to, to work. And so it always takes time.
If you start from the beginning, what the PDR, Physician's Desk Reference, says is it takes six to 12 weeks.
Since he was on half a dose, I wouldn't expect it to take that long, it would probably be quicker.
I didn't see where it said any place. It depends on how it is processing in each individual's liver, on how long it

would take, but it certainly wouldn't take affect that morning or even, I would think, even within a week or two.

Q. Would that affect the testing that Doctor Low did at Sea-Tac?

A. It certainly is possible.

Q. And in what ways would it be possible?

A. Well, it's likely that his symptoms were more severe and so he's going to endorse higher symptoms, more symptoms.

He might be more confused. In fact, I'm sure he would be more confused.

12:59PM

And so it's possible that he doesn't hold his attention and concentration as well.

And so you can get inconsistencies, as Doctor Low said in her testimony an hour or so ago.

There are times when you just don't give someone, whose obviously very psychotic, an objective personality test, because it won't, it won't do any good. It will be invalid.

Q. Now you also administered a Fitness Interview Test, Revised. This is on page 25 of your report.

01:00PM

A. Yes.

Q. And that's, what's that test for?

A. It's --

THE COURT: Counsel, at this point, we're going to take our recess from this case.

You folks will be back at quarter of two. And we will

resume at that time.

And we'll conclude this hearing today at 3 o'clock.

Okay, folks. You're in recess at this time.

(Whereupon Court was recessed at 1:00 p.m.)

(Whereupon Court reconvened

in the courtroom at 1:50 p.m.)

THE COURT: Good afternoon. Please be seated. Okay. Let's resume. Mr. Schweda.

MR. SCHWEDA: Thank you, Your Honor.

01:52PM BY MR. SCHWEDA:

Q. Doctor, a couple of things I wanted to ask you, preliminarily.

Do you do much, many competency evaluations?

A. I do.

Q. Tell us about that.

How often, what kind of cases.

A. I would say, on average, I do one a week.

And have been doing so for about the last five years.

Q. And they -- and what courts do you do them in?

01:53PM A. I do them in primarily in Superior Court for the County of Spokane, Grant, Garfield. Eastern Washington.

Q. Okay.

Have you ever qualified as an expert in a competency hearing?

A. Yes.

Q. **How many times?**
A. **Maybe a hundred times.**
Q. **Now, you indicated, when we left off, we were talking about you were explaining that the current standard was, that someone can be competent for a simple proceeding, but not for a more complicated one. And I wanted to ask you to explain that.**
A. **Well, just as I said in my report, the idea is that one can be competent for something that's simple and be incompetent for something that's much more complicated. And I believe that is**
01:54PM **the case with Mr. Burke.**
Q. **And why is it that, why is that the case for Mr. Burke?**
A. **Well, I tested him and he, and gave him a clinical interview and read all of these documents and watched Mr., Doctor Low's interviews.**

And I think he's capable and understands this absconding charge and what the results are of that.

And he pretty much knows the -- I'm losing my train of thought. I didn't eat.

He understands the factual components of the, of that
01:55PM **case. And there isn't a need for a lot of rational understanding.**

Whereas, if the case, if the case is more complicated, then one needs to have more rational ability.

If you have more witnesses, as the case proceeds, it can become more complicated and you have to understand the

infrastructure and how that changes and what the evidence is doing and how you should plan strategy or change strategy.

And I think that, I don't believe that Mr. Burke would be able to do that.

Q. How did you come to those conclusions?

A. Well, I, again, I looked at his history. He's, his very long history of psychosis. And his symptoms. The testing, the competency tests that I gave him, and that's what I came up with.

01:56PM Q. And what competency testing did do you?

A. The first thing I did, I, is I gave Mr. Burke a semi-structured screening interview called the FIT-R.

Q. Spell that for the record.

A. Well, it's a Fitness Interview Test. F I T. Revised. FIT-R. And that test is more, it's a screening interview, and he came out showing some severe deficits in his rational understanding.

And so I gave him a more defined structural interview, that's used quite a bit, validated and all of that, that's

01:57PM called the MacCat.

And during that testing, I found that, again, that, factually, he could understand what was occurring.

But when we got into the reasoning portion of that, and I started questioning him about witness testimony and what would happen if someone began lying, it completely derailed him.

And I think that, in my opinion, that's when his psychosis interfered. And I think that's more than likely to occur, should he get involved in a more complicated case.

Q. **So, one of the violations that, or alleged violation is that Mr. Burke has, is a murder that occurred in 2013 in Snohomish County.**

Would Mr. Burke be competent to defend that charge, of a supervised release violation charge?

A. **I didn't understand the question. Something, a murder versus supervised release?**

Q. **Well --**

A. **I didn't understand.**

Q. **So, Mr. Burke is in this court on supervised release violations.**

A. **Right.**

Q. **That's the subject matter of the hearings.**

And one -- he's -- he has two violations:

One is absconding.

And the second one is he committed another crime. That is, murder in Snohomish County.

Would he be competent to defend and work with an attorney on defending against the supervised release violation of committing a murder in Snohomish County?

A. **I think he could, I think he's competent to, to, to go to trial on a, on, on this particular charge, because it's**

simple --

Q. Absconding.

A. -- absconding.

MR. OHMS: Objection, Your Honor. That's leading.

THE COURT: Overruled. Go ahead.

BY MR. SCHWEDA:

Q. But I'm getting back to, does it depend on how sophisticated the hearing on the supervised release violation of a murder would be, in order for you to render an opinion as to whether he's competent to defend himself on that?

A. I think the more complicated the case, the less likely it is that he's going to be competent.

I don't know what would be involved with a murder trial. Or particularly one where Mr. Burke would be involved.

I have read the Snohomish County records and I have read about the alleged crime, but I don't, I don't have any information on that.

And I didn't, I just -- I am just trying to point out that, on a simple case, I believe that he's competent.

As a case becomes more complicated, I don't think he would be.

Q. So --

A. If it's an open and shut, I think that would be easy.

But if there's a lot of complicated testimony and defense, how we're going to go about doing this, and how, if

that would change during the course of a trial, I think that would set him off, and he would, because of his mental illness, I don't think he would be able to do that.

In the Western, the Western State Hospital notes -- and I'm sure I put this in the report -- he has this, I don't have any symptoms, "I do have symptoms. I don't have symptoms, I do have symptoms." And there's some exaggeration.

And they took that into account and still thought he was gravely disabled. And I do, too.

02:02PM I don't, I don't believe that he's malingering. I think he is doing some feigning, but I don't think he's malingering.

Q. Why do his symptoms change?

A. Well, that's the reason why I diagnosed him with a schizoaffective disorder. A schizoaffective disorder is psychotic symptoms, like auditory and visual hallucinations and delusions and that type of things that are like schizophrenia.

But there's also an affective component, where there's depression and anxiety, some hypomania, perhaps mania. And this

02:02PM is the reason, in my opinion, in those -- and those different symptoms come and go. And that will affect his psychosis and it will, it will affect the way he presents.

Q. I wanted to ask you some, a few questions about the testing that Doctor Low did.

She gave what is called the ILK test. Are you

familiar with that?
A. I am familiar with that, yes.
Q. Is it a published or standardized test?
A. It's a published screening instrument for legal knowledge as to whether or not someone is putting for the best effort on, on that. It's kind of like a malingering test.
Q. And how did Doctor Low score that test and what conclusion did she have?
A. Her conclusions were that he failed that test and that he
02:04PM wasn't putting forth best effort.
Q. He was not.
A. He was not.
Q. How did you score the test?
A. Well, in looking at the norms, he is right at the cutoff of possibly not telling the truth and telling the truth.
The problem with this measure is that both of those, honest responders and malingering people, overlie each other and so you can get false positives and negative negatives.
It's, it's to give you a general idea.
02:04PM This, I suspect, is the reason why Doctor Low didn't just rely on that, she also looked into more, more information about his competency.
Q. So, what's your opinion as to the score, Mr. Burke's score on the test?
MS. VAN MARTER: Your Honor, I'm sorry, which test are

we talking about?

MR. SCHWEDA: The ILK.

THE COURT: The ILK? Yes. Page 27 of Doctor Low's report.

THE WITNESS: I think it could mean either. I think it could go either way.

BY MR. SCHWEDA:

Q. So --

A. I think it does not say that he's malingering.

02:05PM Q. So you disagree with Doctor Low then, to the extent --

A. Yes.

I don't, I don't think it -- in the way I read the scales, it shows, it's right on the cutoff of saying that he answered okay.

Q. Okay.

The, now, Doctor Low also gave the PAI test.

A. Yes.

Q. And that's Personal Assessment Inventory?

A. Personality Assessment Inventory.

02:06PM Q. Okay.

And Doctor Low said that Mr. Burke's responses were over, an over representation and an exaggeration of his clinical profile.

What do you think?

A. I --

THE COURT: About what?

MR. SCHWEDA: Whether his responses are an over representation and exaggeration of his clinical profile.

THE COURT: On Doctor Low's test?

MR. SCHWEDA: Correct.

I'm asking her to state her opinion as opposed to what Doctor Low has stated.

THE COURT: Well, I'm wondering what the, what you're actually asking her to compare.

02:06PM Is it her judgment, based on her test; or judgment or her opinion, based on all tests; her opinion based only on Doctor Low's tests? What are you asking?

MR. SCHWEDA: I'm asking if she agrees with Doctor Low's assessment of the PAI test.

THE COURT: All right.

Go ahead.

THE WITNESS: Well, I believe that Doctor Low, essentially, is saying that the PAI is over reported.

And again, I don't think that means that -- I do not

02:07PM believe that the PAI is showing a malingering profile.

I think that the profile -- first of all, there are scale scores on the PAI.

As a psychologist, we don't particularly -- we look, of course, at the scores, but what we're looking at primarily is the profile of how that looks.

And the profile on this PAI is consistent with all of his symptoms.

So, there's a question as to whether or not it's over reported, but because it fits all of his history, I don't think it is.

It isn't defined, there is -- this test does not say, absolutely, that this test is over reported.

And because it fits the profile of his history, I don't believe that it is.

02:08PM Q. **Would you go to page 17 of your report. Which is exhibit 113 or ECF 251.**

A. **Yes.**

Q. **And there's a paragraph down there where you state it was not lost on the doctors in the June 18, 2015 petition that Mr. Burke would embellish symptoms, but that all of his symptoms of his illness were entirely fabricated.**

Can you explain that sentence and the rest of that paragraph.

A. **Yes.**

02:09PM **What they're noticing at Western is that there are times when Mr. Burke seems to deny and embellish symptoms.**

But he also does that when there isn't any secondary gain.

And that they believed, at that time, that his symptoms were real, that he was psychotic, gravely disabled, and

should be continued to be hospitalized at Western for another six months.

I think that's very consistent with his presentation now.

Q. If you would go to then the last page of your report. Page 28.

And during the testimony here, the government questioned why you would quote U.S. Probation Officer Chalinor the way you did in that paragraph.

02:10PM Why did you do that?

A. I think -- I concluded that they said it very well.

That Mr. Burke has been involved in this system for a very, very, very long time. And that with all of the accusations and treatment and non-treatment that he has received, the system hasn't done well by him.

And I agree with that.

Putting a malingering diagnosis in his 25, three and a half inch records, putting a malingering diagnosis in that milieu, I think, complicates the picture. It's very damaging.

02:11PM And if people are only looking at spot reviewing things, instead of all this tremendous amount of medical record, I think they will get the false impression and he won't be served well.

And I think that's what they were saying there, too. And that's why I put it in.

MR. SCHWEDA: That's all I have, Your Honor.

THE COURT: Thank you.

Cross?

CROSS-EXAMINATION

BY MR. OHMS:

Q. Good afternoon, Doctor Brown.

So, I would like to start with some questions about your background, your resume.

A. Sure.

Q. So, do you have a copy of your resume there?

Maybe the best thing to do --

A. I think there's one, I think there's one in this.

Q. Well, why don't I do this.

I'll make an exhibit out of the one that's been provided to us.

MR. OHMS: May I offer it up and provide a copy to the Court?

02:13PM THE COURT: What exhibit number are you going to put on that? You say resume. Do you mean CV or --

MR. OHMS: I do, Your Honor.

THE COURT: Thank you.

MR. SCHWEDA: I believe that's been admitted, Your Honor. I thought it was exhibit number 1 in exhibit number

or I -- strike that. That's Doctor Low's.

MR. OHMS: If I may approach, Your Honor.

THE COURT: You may.

(Handing exhibit to counsel and witness.)

BY MR. OHMS:

Q. So, I handed up to you what's been marked as government's exhibit number 6 for identification.

And isn't that, in fact, a copy of the CV that you provided to the defense counsel in this case?

02:14PM A. It looks like it to me. It looks like it.

Q. Okay.

MR. OHMS: Government offer's government exhibit 6.

THE COURT: Any objections?

MR. SCHWEDA: Pardon?

Oh, no objection, Your Honor.

THE COURT: Admitted.

MR. OHMS: I have a courtesy copy I can hand up to the Court. If the Court would prefer to --

THE COURT: Fine.

02:14PM MR. OHMS: -- view it that way.

THE COURT: You can use the ELMO if you want. Whatever is easier.

(Handing exhibit to Court.)

THE COURT: Okay.

Let's get started.

BY MR. OHMS:

Q. So, as I understand your CV, you, back in August of 1993, to July of 1994, you were a psychology intern.

Is that correct?

A. Sure. Yes.

Q. And up to that point in time, there isn't anything in your CV about forensic evaluations or forensic examinations.

Is that correct?

A. That's correct.

02:15PM Q. And the forensic evaluations would come in as part of the work that you began doing or part of the course of study that you began in clinical psychology.

Isn't that true?

A. Yes.

Q. And so your clinical psychology then was in 19, March of 1997 to July of 1998; is that correct?

A. My clinical psychology training?

Q. Yes.

A. No, my clinical psychology training started about in 1986.

02:15PM Q. All right.

But there's nothing in your CV, up until 1997 to 1998, indicating that were you working specifically in the area of forensic assessment.

Isn't that true?

A. I did not do any clinical -- you're right, yes, you're

right.
Q. So, in 1997 to 1998, you began what you described as a residency?
A. Yes.
Q. And what is a residency? Why do you describe --
A. That's your post-doc hours. That's called a residency.
Q. Is it also called internship?
A. No. The internship is before you get your Ph.D.
Then you get your Ph.D. and then you begin your residency. It is your post-doc hours.
Q. Okay.
A. That's before you can sit for your test, for your licensing exam.
Q. And I'm, and am I correct that this, this then occurred, the clinical psychology residency occurred before you were licensed as a psychologist?
A. That's true.
Q. All right.
So, and then it indicates that you conduct, provided a number of, I guess, services or gained experience in a number of areas, during that clinical psychology residency.
Is that, isn't that true?
A. Yes.
Q. And one of those was the forensic clinical, excuse me, the forensic assessment.

A. **Yes.**
Q. **And by forensic assessment, are you referring to a criminal forensic assessment of competency?**
A. **I didn't start criminal assessment of competency until about five years ago.**
Q. **Okay.**

So that, I guess that's what, that's how, that's what I'm trying to clarify.

So, five years ago, from today's date, would be then 02:17PM **-- we're in 2016, 2011 is when you began that area of your practice.**
A. **That seems about right.**
Q. **Okay.**

So, where it says, in your CV, back in 1994 to 1998, that you were an expert witness for forensic evaluations, you're referring to something other than what we're doing here in the courtroom today.
A. **Yes.**
Q. **What were you referring to as occurring back then?**
A. **I was doing various evaluations for the Court on risk assessments. I was doing different family law cases.**
Q. **Okay.**

So you were doing family law cases.
A. **Head injury. Head injury.**
Q. **You weren't -- and you were referring to those as forensic**

evaluations?
A. Yes.
Q. Okay.
So, a risk assessment is a forensic evaluation?
A. Yes.
Q. Family, I -- I, you were referring to something having to do with family practice --
A. Right.
Q. -- is a forensic assessment?
02:19PM A. Yes.
Q. Okay.
Where you refer then to July of 1998 to present, and you indicate that you were a consultant and expert witness for forensic evaluations, including competency, that's not exactly --
A. Where do I say that?
Q. -- correct --
A. I'm sorry, where do I say that?
Q. On the first page of your CV. Where it says, July 1998 to
02:19PM present. Under your second bullet point, it says that you were a consultant and expert witness for forensic evaluations, which we know you use as a very generic term to mean, essentially, any kind of evaluation, correct?
A. Well --
Q. And here it says, competency. Isn't that correct?

A. **Yes, you're right. That's wrong.**
Q. **So that's not an accurate statement of your experience, is it?**
A. **No, it's not.**
Q. **Okay.**

And that creates an impression that you have greater experience than you actually do.

Isn't that true?

A. **Yes, it would.**
02:20PM Q. **All right.**

Now, you also testified a few minutes ago that, since you've been doing these forensic evaluations in the area of competency, that you've been doing on average about one, one a week?

A. **That's what I said.**
Q. **For about five years?**
A. **About that.**
Q. **Okay.**

So, one, one a week might be four in a given month?

02:21PM **Might be six in a given month?**

A. **Could be four, could be six. It could be two.**
Q. **All right.**

So, are you familiar with the declaration that you provided in this case, under ECF, filed under ECF 209? 209?

A. **I don't know that number.**

Q. **Well, did you provide a declaration in this case?**
A. **I believe I did.**
Q. **And --**
MR. OHMS: Your Honor, I would like to show this on the ELMO. It's ECF 209.
Does the Court wish that I mark it as an exhibit?
THE COURT: I don't know what it is.
MR. OHMS: It's a -- it's the declaration of Debra D. Brown.
02:21PM **THE COURT: It doesn't have to be an exhibit, it's in the file already, you can simply show it to her and ask her what you're going to ask her about it.**
MR. OHMS: All right.
BY MR. OHMS:
Q. **So, I'm showing you what's been filed as, it's on the screen there --**
A. **Um-hum.**
Q. **-- as ECF 209, which indicates it's a declaration by you. Is that correct?**
02:22PM A. **Yes.**
Q. **Do you remember, do you recall writing that?**
A. **Yes.**
Q. **All right.**
And do you see on the second line, of the second paragraph, where it talks about how many competency evaluations

you do?
A. Right.
Q. What does it say there?
A. It says six to 12 mental competency evaluations in criminal cases per month.
Q. Per month.
But, actually, you do on average, four a month, maybe three, maybe two, maybe six; isn't that true?
Isn't that true, ma'am? Isn't that what you just testified to?
02:22PM
A. Yes, that's what I just testified to.
Q. Okay.
So doesn't that statement in your declaration tend to over emphasize or over state your level of experience in this area?
A. Yes, I guess it does.
Q. Now, ma'am, when you talk about a competency evaluation that you're referring to in your declaration, and that you've been testifying about, are you referring to, essentially, what
02:23PM
has been admitted as government's exhibit number -- excuse me, as defense exhibit 113 -- which is your report in this case?
A. Yes.
Q. Okay.
So you're talking about producing, on average, four reports of this nature, similar to this, each month?

A. **Well, I would like to -- may I explain that?**
Q. **Well, I think, I think I can help by asking some questions. Are you actually --**
A. **Okay.**
Q. **-- including in your statement about competency evaluations, things that may not ultimately result in a full report?**
A. **Yes.**
Q. **Okay.**
02:23PM A. **I would also like to say that my husband recently died and my practice is lessened.**
Q. **Well --**
A. **I'm not doing as much work.**
Q. **I appreciate that, ma'am.**
So, so, even when we're talking about what you describe as a competency evaluation, those don't all result in a report?
A. **Not always, no.**
Q. **And is it often or sometimes the case that you're contacted**
02:24PM **by a defense attorney and asked to do, to help out with some type of advice on competency?**
A. **Yes, I'm asked that also.**
Q. **And that would be preliminary to the defense attorney actually deciding what, what motions to file in court?**
A. **Sometimes.**

Q. **And are you including that type of evaluation within the figures?**
A. **No.**
Q. **Okay.**
So, you're a professional, so you get paid for your services, correct?
A. **I do.**
Q. **And how much do you charge to, to do a competency evaluation, that results in a full report, such as the one that's been offered in this case, defense exhibit 113?**
A. **I charge by the hour.**
Q. **How many hours does it take you?**
A. **It depends on how complicated the case is.**
Q. **Right.**
But you do an average of four a month, so I'm sure that, on average, you have a sense of how long it takes.
A. **Eight to 20 hours.**
Q. **Okay.**
And what do you charge?
A. **I charge $200 an hour.**
Q. **And --**
A. **And I do a flat competency rate at $800 for Spokane County. But if there is more involved, then that goes up, depending upon what needs to be done.**
Q. **Okay.**

Do those charges include testing?

A. **Sometimes.**

Q. **Sometimes not?**

A. **Sometimes not.**

Q. **So --**

A. **Depends on how big the case is.**

Q. **And if you actually, if you are actually going to conduct testing, would that be an additional charge?**

A. **Usually, yes.**

02:26PM Q. **And does that include time that you spend reviewing someone else's work product?**

A. **Yes, sometimes.**

Q. **Okay.**

Because you, you went through and indicated all the records that you reviewed in this case.

You're actually billing for all the time that you spent looking at those records, correct?

A. **Well, actually, I didn't bill for all of the time. I ran out of time.**

02:26PM Q. **Okay.**

A. **I ran out of hours that were allowed.**

Q. **And do you also bill for the time that you watch, that you spend watching the forensic evaluation, conducted by someone else, by video?**

A. **I do.**

Q. **And do you also bill for being in the courtroom and testifying?**
A. **I do.**
Q. **And how much do you charge for that?**
A. **I charge, I believe I charge 350 for that.**
Q. **350 to testify for the whole day?**
A. **No, per hour.**
Q. **Okay.**

And -- all right. Let me move on.

02:27PM **Oh, do you primarily testify in Federal Court or in State Court?**
A. **State.**
Q. **All right.**

Have you testified in Federal Court before?
A. **I have.**
Q. **And so you're familiar with the standards that are used in the federal system to determine competency?**
A. **I'm not as familiar with them as I am with the state.**
Q. **Well, for instance, what statute do you refer to in**
02:28PM **federal, in the federal system, when you're evaluating competency?**
A. **I don't know. I don't know a number.**
Q. **Have you ever read the federal statute that describes the standard for competency?**
A. **No, but I'm assuming -- my assumption was that you go by**

the Dusky standard.
Q. Okay.
So, do you know whether that standard, that legal standard, permits a bifurcation, where a person could be competent for one type of hearing, like say, for instance, being, going to trial on a DWI charge, versus going to trial on a domestic violence charge?
Do you know whether the federal --
A. I don't know. I don't know whether it addresses it or not. I've been taught that's the standard.
02:28PM
Q. And that was from the webinar?
A. Yes.
Q. That's the webinar that you were describing when, in your prior testimony.
A. Yes. That I do once a week.
Q. All right.
So, now when you did your evaluation of the defendant in this case, you had video recordings of Doctor Low, of Doctor Low's examination of the defendant to look at, correct?
02:29PM
A. Yes.
Q. And how much time did you, how many meetings did you have with the defendant personally, face-to-face, as part of your evaluation?
A. I believe I had four.
Q. And how much time did you spend with him total?

A. **About seven hours.**
Q. **And did you videotape those sessions?**
A. **No.**
Q. **Now, isn't it true, ma'am, that you made it a point in your declaration to indicate that the, that Doctor Low should videotape her sessions, in order for you to be able to review them?**
A. **Yes.**
Q. **But you chose not to videotape your sessions?**
02:30PM A. **Correct.**
Q. **So, no one's able to actually review and critique the sessions that you conducted with the defendant in the manner that you've done with Doctor Low.**
A. **True.**
Q. **And isn't it in -- in fact, I'm looking at page two of your declaration -- isn't it true that, in your declaration, you actually stated you did not understand why they, meaning Doctor Low, would want to hide their exam process. Isn't that true?**
A. **True.**
02:31PM Q. **Did you want to hide your exam process?**
MR. SCHWEDA: You know, I'm going to object, Your Honor.
There was never any request from the government that she videotape any of her interviews. So if they had made that request, we would have addressed it at that point.

I think it's unfair to try to impeach her testimony in this fashion now, when they never asked for it.

THE COURT: You made your record. You may continue.

BY MR. OHMS:

Q. And I think -- and you heard the objection of your, of counsel just now.

A. Yes.

Q. All right.

And let's concede there's a fair point there. Nevertheless, you considered it important, very important, that Doctor Low record her sessions for you to see.

A. I did.

Q. And you did not consider it important, equally important for you to videotape your sessions.

A. I didn't think that was my job to figure that out.

Q. Okay.

So, with regard to the SIRS-2 test that you did, you heard Doctor Low's testimony that the test has been invalidated, because the author omitted a large amount of the standardized sample?

A. I heard her say that, yes.

Q. And that's something that you indicated that you have never heard of?

A. Never heard of it.

Q. You're not familiar with it whatsoever?

A. **No.**
Q. **And --**
A. **Not that I, not that I remember.**
Q. **All right.**
MR. OHMS: This is --
BY MR. OHMS:
Q. **I'm going to show you -- I would ask you to turn, in your CV, in government's exhibit 6, to where it says, special studies.**
02:32PM **And the CV is not paginated, so I could count the page numbers. One, two, three --**
A. **I see it.**
Q. **-- four, five, six.**
A. **Yes.**
Q. **And number one, two, three, four, five, six, seven, the seventh entry in that is -- and first, these special studies are what, ma'am?**
A. **These are the classes and webinars and things that you take to keep your license.**
02:33PM Q. **Right.**
So this is, essentially, continuing education?
A. **And to continue -- continuing education, sure.**
Q. **Continuing professional education.**
A. **Yes, sir.**
Q. **And you see down at about the seventh entry?**

A. **Yes.**
Q. **Test Based Evaluation of Feigning in Clinical Forensic Assessments, May, 2014?**
A. **Yes.**
Q. **Do you recall where you took that?**
A. **San Diego.**
Q. **You -- were you personally present for that?**
A. **Of course.**
Q. **All right.**
02:33PM **Well, you said some of these are webinars. So it's not necessary --**
A. **Well, with the invention of the, yeah, the past couple years they have been.**
Q. **Okay.**
So, and isn't it true, ma'am, that at that specific course, they talked about this exact fact?
A. **Not that I remember.**
Q. **If you had known this information, that the author had omitted a large amount of the standardized sample, would that**
02:34PM **affect your judgment about it?**
A. **I would look into it more.**
Q. **Okay.**
If you determined that that in fact was the case, would that impact your judgment about the test?
A. **I would look into it more.**

Q. **Ma'am, meaning what, ma'am? I'm asking you.**
A. **I mean, I would need to know, I need to know who said that, why did they say that --**
Q. **No, no ma'am --**
A. **-- was it published --**
Q. **-- we're mis, I'm mis, we're miscommunicating.**
A. **-- was there anything else.**

MR. SCHWEDA: Your Honor, I object.

Your Honor, I would ask that she be allowed to finish her answer.

02:34PM

THE COURT: She did finish her answer. Go ahead.

THE WITNESS: I would --

THE COURT: Do you want to --

THE WITNESS: I would ask other people what their opinions are. I would need to know the data on that.

BY MR. OHMS:

Q. **Correct.**
A. **I don't recall any data on that.**
Q. **Here's my question --**

02:35PM

THE COURT: No.

THE WITNESS: Okay.

THE COURT: Are you okay?

THE WITNESS: Yeah, I'm just getting a headache.

THE COURT: I'm sorry?

THE WITNESS: That's okay. It's okay.

THE COURT: If you're okay, fine. If you need a break, let me know.

THE WITNESS: Okay.

THE COURT: Go ahead.

BY MR. OHMS:

Q. My question is about the assertion that a large amount of, that the author omitted a large amount of his standardized data.

Do you consider that a relevant assertion, an important assertion?

02:35PM A. That he eliminated? I don't understand what that means.

Q. You don't understand --

A. That means he --

Q. -- the sentence?

A. He cheated on, I mean, he gave false data? I don't understand what that means.

Q. That he omitted data. Omitted a large amount of his standardized sample.

A. That he just took the data out? Yeah, that would, that would concern me.

02:35PM Q. Okay.

And isn't it true then that that would cause you to question the validity of that test?

A. Yes.

Q. And isn't it true that if you had that information, you would include it in your report; if, in fact, you used that, you

would say, I'm using the test, but I want you to know there's a caveat. Isn't that true? That you would provide the Court and parties with that courtesy.

A. Probably.

Q. All right.

Now, ma'am, you indicated in your report and you reference in your report that the defendant tested previously with an IQ of 112.

Isn't that true?

02:36PM A. Can you tell me where I said that?

Q. That would be page seven. At least, at least, at least it's what I have as page seven.

Mine is paginated and it says seven at the bottom. I don't know if there's an issue with pagination, but it's in the, it's in the, it's in the final paragraph on page seven.

A. Yes.

Q. Second sentence?

A. Yes, I see that.

Q. Okay.

02:37PM Okay. So you recall that.

A. That, that -- yes.

Q. And isn't it true, ma'am, that a person can score poorly on the IQ test for a lot of reasons. They may not be trying hard, they may be, they may be feigning that they're not as smart as they are.

Isn't that true?

A. **Or psychotic.**

Q. **But isn't it also true that a person can't score higher on the IQ test by feigning or pretending?**

A. **I wouldn't think so.**

Q. **Okay.**

So, when, when we have a measurable score of 112, that's a genuine score, isn't that true, genuine, in the sense that we know there's no, he might be smarter than that, he might even have a higher IQ, but he doesn't have one that's lower than 112, at the time of that test.

A. **At the time, yes, of course.**

Q. **All right.**

And isn't it true that, in your report, you don't express any concerns about his cognitive ability, in terms of his, his IQ level.

A. **True.**

Q. **And isn't it true, ma'am, that in your report -- in fact, I believe you mentioned this -- when you first had contact with the defendant, he said, essentially, that -- this is on page 20 -- that Doctor Low is, that the other report is wrong, I'm mentally ill. He made that assertion to you.**

A. **Okay. Where on page 20?**

Q. **Well, do you recall testifying about that, ma'am?**

A. **I need you to ask the question again.**

Q. **Okay.**

Do you recall testifying that, when you first met with the defendant, he told you immediately, that the other report was wrong, and that he was mentally ill.

A. **Yes.**

Q. **Okay.**

And you, in fact, had included that in your report, correct?

A. **Yes.**

02:39PM Q. **And I believe, in your direct examination, the way you expressed it was, there were reasons why the report wasn't as good as he would have liked it. That's how you expressed it in your direct testimony.**

A. **Okay.**

Q. **So, in other words, he was explaining that Doctor Low got it wrong and that, and, in fact, she was biased from the prior tests that she had done back in 2007, and therefore that was the reason why the report wasn't as good as he would have liked it. Isn't that true?**

02:40PM A. **Yes.**

I don't think it had anything to do with testing, but that, yes, that he --

Q. **Well, isn't it true that you testified in that way on direct examination?**

A. **That it had to do with testing?**

Q. **No, that it had to do with the fact that he -- he came up with an explanation, that Doctor Low --**

A. **Yes, that's what he said.**

Q. **-- was, had prejudged the case.**

A. **He, I don't know if -- he didn't say that.**

What he said was, oh, whatever I wrote that he said.

THE COURT: No, just read it, counsel. You have it right there, don't you?

MR. OHMS: Well, what it says in the report was, "the other report is wrong, I'm mentally ill."

02:40PM

My question was having to do with what she testified during her direct.

THE COURT: She may not remember what she testified to.

MR. OHMS: She may not.

BY MR. OHMS:

Q. **If you don't remember, that's fine.**

A. **I don't remember.**

Q. **Okay.**

02:40PM

Now, isn't it true that if a person is explaining to you the reasons why the report wasn't as good as he would have liked it, that the, that the reasonable conclusion of those words is that there's a way that he wanted that test to come out?

A. **What test are you talking about?**

Q. **The, the -- excuse me, the report. There's a way that he would have liked the report to come out.**
A. **What I heard was that he thought that Doctor Low was saying he wasn't mentally ill. And that was wrong. He was.**
Q. **Correct.**
But on direct examination, isn't it true that you said that he explained the reasons why the report, Doctor Low's report, wasn't as good as he would have liked it, wasn't it true that that's what you testified to?
02:41PM A. **I may have. I don't remember.**
Q. **And doesn't that, in fact, indicate that there's an answer that he believes is good and an answer that he believes is bad, with regard to the report?**
A. **If that's what he said.**
Q. **Okay.**
And doesn't that then suggest that he has an interest in how the test comes out, or not the test, but the report comes out?
A. **Yes, I guess it would.**
02:42PM Q. **And that kind of interest is called an agenda, isn't it?**
A. **Yes.**
Q. **And isn't it true that, when he talks to you, the, when you first meet him and he says, "the other report is wrong, I'm mentally ill," that that's an expression of that agenda.**
A. **I think it could be, but I don't think that's necessarily**

true. I think that's, I think you're narrowing that down.
Q. Well, you're entitled to, to your opinion, and to, and I'm sure counsel can bring out your, your ambivalence in cross-examination.
But isn't it true it's consistent with a person who has an agenda and is telling you how he wants your report to come out? Isn't it consistent with that?
A. It could be.
Q. All right.
02:43PM Now, ma'am, isn't it true that, during your questioning of the defendant, in terms of getting his background, that he was responsive to your questions?
A. That he was responsive to my questions?
Q. Yes.
A. Yes.
Q. You would answer, you would ask a question, and he would respond, he was responsive to the question. The answer made sense in context with the question.
A. Often. Often it, sometimes it didn't. He would get off on
02:43PM a different topic or become tangential or derailed.
Q. Right.
And isn't it true that he expressed the self awareness of his condition, his mental condition?
A. Yes.
Q. He expressed a self awareness of his symptoms?

A. That he would describe his symptoms to me.
Q. He was able to describe his medication?
A. I don't -- I don't remember if he described his medication or not. Lots of people know one or two of their medications and don't know the rest of them.
Q. Isn't it true, ma'am, isn't it true, ma'am, that he actually expressed the opinion that he wasn't getting enough of his medication? He was very clear about how much medication he needed.
02:44PM THE COURT: Are you citing to a particular part of her report?
MR. OHMS: No, Your Honor.
THE COURT: Oh. You're just asking her a question. I apologize. Go ahead.
BY MR. OHMS:
Q. Is that true, ma'am, or not?
A. Did I write that down?
Q. Is that what he expressed to you?
THE COURT: He's asking you whether you remember that,
02:45PM during your evaluation.
THE WITNESS: I don't remember. I don't remember.
THE COURT: Okay.
THE WITNESS: I don't remember that he did.
BY MR. OHMS:
Q. All right.

Now, isn't it true that some portion of your background interview, the, or the interview that you conducted with the defendant, to develop his background, you talked about his childhood?

A. **Yes.**

Q. **And isn't it true that, at some point in time, he began to meander off of that topic?**

A. **I'm sure he did.**

Q. **And isn't it true that you were able to redirect him back on to that topic?**

02:45PM

A. **There were times when I could, yes.**

Q. **Okay.**

Well, I'm looking at page 21, first full paragraph.

It states, "Mr. Burke was able to redirect his attention to questions regarding his childhood."

Redirect, meaning he was able to shift gears and to move back into the topic he wanted to discuss.

Isn't that what that means?

A. **That's what that means.**

02:46PM

Q. **All right.**

Isn't it true that he recalled specific details from his childhood, that he was able to articulate to you?

A. **He did, but it wasn't always accurate.**

Q. **Isn't it true, ma'am, that he was able to, that he was responsive to questions about his prior court proceedings?**

Responsive to those questions. You would ask a question and he would answer.
A. I think he tried to answer my questions.
Q. Isn't it true that he, in fact, described a plea deal that he had struck?
A. He described something about how someone had offered something and he had signed a paper, I believe.
Q. Do you recall him using the words, "plea deal?"
A. I think I remember that, yes.
02:47PM Q. Do you have your report? Defense exhibit 1, uh, 230 -- 113.
A. Yes.
Q. If you look at page 21, again.
THE COURT: 20?
MR. OHMS: 21.
THE COURT: 21. Yes.
Which paragraph?
MR. OHMS: It's the last full paragraph.
So it's the one that starts out, "he reported he had
02:47PM gone to court in the past."
BY MR. OHMS:
Q. Do you see that paragraph?
A. Yes.
Q. And do you see where he indicated that, instead of going to trial, he took a plea deal?

THE COURT: Go down the left hand margin to the word "instead" and then go across.

THE WITNESS: I must have a different copy. I don't have an "instead."

THE COURT: Okay. Well, the report says, on page 21, at that paragraph, "He did not remember going to trial, but instead took a, 'plea deal.'

He explained, 'this is where you say you are guilty and sign a paper.'

02:48PM **When queried about a plea of not guilty, he reported that he had had three or four charges in the past and though, and although he was actually 'innocent', he would take a 'plea deal.'**

He explained his reasoning" -- that's not relevant. So, we'll stop there.

Do you see that?

THE WITNESS: Yes, I do.

THE COURT: Okay.

MR. OHMS: All right.

02:48PM **THE WITNESS: It's in my second to the last paragraph.**

BY MR. OHMS:

Q. **And I, and I can't explain why the pagination is not exactly the same on mine as it is yours, but that's, that appears to be the way it is.**

Now, where you put quotes around "plea deal," is that

because those are words he's using?
A. Yes.
Q. Okay.
And then, just where the Court left off reading, if you read into that next section, isn't it true that he describes, in some great detail, what the event involved with his mother? The event, meaning the event that led to criminal charges?
A. I need to read -- I need to put this in context and then I can help you.
(Pause.)
Okay. Okay. What's the question?
Q. Isn't it true that he was able to, to describe, in detail, what the incident was about and why he, essentially, why he worked out a plea deal; or what was different about what, what the facts actually were, versus how they were alleged.
A. Well, he said his mom never, his mother never said that --
Q. He said --
A. -- and that the police misunderstood.
Q. Okay.
So he's explaining to you actually what happened in that prior case.
A. His view of what happened.
Q. All right.
So, he was able to articulate that to you in some

detail.

I pled guilty to it, but, here's what actually happened. Isn't that, isn't that what's being expressed there, ma'am?

A. **Yes.**

THE COURT: Counsel, for your purposes, it's now 11 minutes to three.

My staff and I have not eaten. We have been working since three o'clock, or since nine o'clock this morning, actually been here before that, closer to eight.

02:50PM

And so we're, the question was, we worked through the lunch hour, so that we could finish by 3. And that's what we had intended.

What's your schedule?

MR. OHMS: You know, as far as continuing with the hearing?

THE COURT: Both the length of your cross, recalling Doctor Low, and the full length of the hearing.

MR. OHMS: You know, Your Honor, if I consult --

02:51PM

THE COURT: Because this was scheduled for four or five hours.

MR. OHMS: Yes, Your Honor.

If I can, if I can talk briefly with co-counsel, I may be able to just end the cross-examination. I don't know how much further --

THE COURT: That's up to you.

I'm not trying to rush anybody. I'm simply telling you what we scheduled this hearing for and how my staff and I have worked to make sure that we held our, held up our end of the bargain.

So, you better consult with co-counsel on the length of your cross and whether you're calling, recalling Doctor Low.

And Mr. Schweda may have some redirect for this witness as well.

02:51PM **(Pause.)**

BY MR. OHMS:

Q. **Doctor Brown, when you were testifying about your conclusion about competency in this case and the fact that your conclusion was he may be competent for one type of hearing, but not competent for another type of hearing; and the hearing in this case involves allegations that the defendant violated the conditions of his supervised release.**

Do you know what is involved in a hearing on a violation of supervised release?

02:52PM A. **I don't know exactly, but I would think it's very simple. And he said that he, he, he talked to me about it, and it seemed pretty simple.**

Q. **Okay.**

A. **And what he expected and how that would occur.**

Q. **All right.**

So, and you also don't know what would be involved in a hearing to determine whether or not he violated conditions of his supervised release, based upon the commission of another state or federal crime.

Isn't that true?

A. True. And I'm not saying that.

Q. I'm sorry?

A. I'm not saying that.

I didn't, I, if that's what you heard, that's not what I meant.

02:53PM

I meant that, as trials become more complicated, I don't think he can do that. But I think --

Q. You don't think he --

A. -- I think something simple, he can.

Q. Well, let me ask you this:

Part of your concern was the fact that he could become derailed, correct?

A. Yes.

Q. And you, specifically, in your testimony, went back to the fact that he became derailed when you were talking about what would happen if somebody told a lie in the courtroom. What would he do.

02:53PM

And he became derailed and didn't, couldn't respond.

A. Yes.

Q. He wasn't responsive at that point.

A. **Yes.**
Q. **Did you make any effort to get him re-engaged with the question?**
In other words, if he was derailed, did you try to bring him back?
A. **I followed the questionnaire.**
Q. **Okay.**
So you didn't. Isn't that true?
A. **True.**
02:54PM Q. **So, and isn't it true that his counsel wouldn't be limited by that. His counsel could say, wait a minute, let me get you back on track, let me get you back on the rails.**
Isn't that true? I mean, his counsel would not be so limited.
A. **No, I don't think that's true.**
Q. **You don't think his counsel could ask those questions and tell the defendant --**
A. **I don't think, I don't think the counsel would necessarily know that the client became derailed.**
02:54PM Q. **If he was nonresponsive, you don't think counsel would recognize that?**
A. **Well, he's not talking. He's, they're not talking right now. I don't know if he's derailed now or not.**
Q. **Okay.**
So, if -- do you think there's some reason why he

should be talking now?
A. No.
Q. Okay.
A. But I don't know how the counsel would know whether or not he was derailed or not.
Q. Well, if he asked a question and he did not get a responsive answer, isn't it true that he could attempt to get him back on track. Just like you did with the history about his childhood.
02:55PM A. Yes, I think that someone could do that.
Q. All right.
And isn't it true, in your, ultimately, in, ultimately, in your, in your evaluation, your, your conclusion about competency, on page 27, very first paragraph of that conclusion, you say, it is possible he will become derailed.
A. Yes.
Q. So, your opinion is based upon a possibility that something bad might happen. Isn't that true?
A. It depends on how complicated things are, yes, of course.
02:56PM Q. But you said, when he becomes anxious or paranoid. That's not based upon complications, that's based upon his perception.
If you read the statement, ma'am. Page 27. "When he becomes anxious and/or paranoid, it is possible he, he will become derailed."
A. Where is this?

Q. **Page 27, first paragraph, under the heading, "Competency." Second sentence.**

A. **Yes, that's what I say.**

Q. **Okay.**

So that didn't have to do with the complexity of the proceeding, that had to do with his perception, when he became anxious or paranoid, he could become derailed.

Isn't that true?

A. **Yes, that's one sentence of my explanation.**

02:56PM Q. **And isn't it true, ma'am, that that's, that that then is an expression of a concern about something that might happen?**

A. **Yes.**

Q. **And isn't it true, ma'am, that, if that were to happen, counsel could try to get him back on track.**

A. **If they knew it.**

Q. **Okay.**

And isn't it true that --

A. **But I don't see how they would know that.**

Q. **Isn't it true that he has the intellectual capacity to understand explanations of court proceedings?**

02:57PM A. **If he's not currently experiencing delusions or hallucinations, so that he can concentrate, of course.**

Q. **All right.**

MR. OHMS: I don't believe I have further questions, Your Honor.

I have no further questions.

THE COURT: Have you actually testified at a criminal trial, in a courtroom, at trial, where the defendant, in your opinion, was incompetent, but the Court had found him competent to stand trial and the defense was one of insanity?

Have you testified in such a case where the defense was, he was insane at the time, and that you testified that he was insane at the time, rather than we're talking about competency, but insanity?

02:58PM THE WITNESS: Yes.

THE COURT: You have?

THE WITNESS: Um-hum.

THE COURT: And the other, and the, the case went forward?

THE WITNESS: Yes.

THE COURT: And the defendant was involved in the case?

THE WITNESS: I don't believe he testified, no.

THE COURT: Well, but he was --

02:58PM THE WITNESS: He was, he was sitting there.

THE COURT: -- sitting at the table.

THE WITNESS: He was sitting there.

THE COURT: And, despite the fact that you found the person not competent, or was insane, the person, the trial went forward.

THE WITNESS: Yes, that was my testimony, that I thought he was.

THE COURT: Okay. Thanks.

Do you have any follow-up?

MR. SCHWEDA: Just real quick, Judge.

REDIRECT EXAMINATION

BY MR. SCHWEDA:

02:58PM Q. **Your CV, do you have that still in front of you?**

A. **I do.**

Q. **So, it says, "Clinical experience, July 1998 to present." And then it goes through a bunch of things that you do.**

Have you done, do you, do you do all of those things today or have you eliminated some of them, picked some of them up?

A. **I do all of those and more.**

Q. **Okay.**

The, there was this reference to the quote from Mr. 02:59PM **Burke, that the first thing he said, "the other report is wrong, I'm mentally ill."**

The implication that I received was that Mr. Burke had an agenda to falsely represent his mental condition.

Did you ever see any evidence of that, in your dealings with Mr. Burke?

A. **No.**

MR. SCHWEDA: I have nothing further.

THE COURT: Okay.

What do you want to do about Doctor Low?

MS. VAN MARTER: Your Honor, I know the Court's -- we have a very limited scope of --

THE COURT: Doctor, I think your time in the chair is over. So you can step down. What's watch your step there.

MS. VAN MARTER: We have a limited scope of redirect, Your Honor.

03:00PM

THE COURT: Sure.

MS. VAN MARTER: If I could.

THE COURT: Go ahead.

We'll accommodate you.

MS. VAN MARTER: Thank you.

And I know the Court wanted to be done at this time. Is there a second time that I need to make sure that we are cognizant of?

I know the roads are getting --

03:00PM

THE COURT: I certainly want to make it clear. I made my record, as to my staff and I. That's all I can tell you.

So, some leeway, yes, but it's two minutes to three, so go ahead.

MS. VAN MARTER: Yes, Your Honor.

THE COURT: You're still under oath, doctor.

THE WITNESS: Yes.

WHEREUPON,

CYNTHIA LOW

having been previously sworn

testified as follows:

MR. SCHWEDA: Your Honor, is it possible that Doctor Brown can sit at counsel table?

03:00PM THE COURT: Doctor Brown can sit wherever she wishes. You may proceed.

MS. VAN MARTER: Thank you, Your Honor.

I marked government's exhibits number 3 and 4 and I have an extra copy for the Court.

May I approach?

I have provided counsel with a copy as well.

THE COURT: Sure.

(Handing exhibit to witness.)

03:01PM **DIRECT EXAMINATION**

BY MS. VAN MARTER:

Q. Doctor Low, were you asked to obtain materials relative to the SIRS-2 testing that has been discussed here in court today?

A. Yes, I was.

Q. **And, specifically, if you could first look at government's number 3.**
A. **Yes.**
Q. **Do you recognize that?**
A. **Yes.**
Q. **And how do you recognize that?**
A. **This is a part of a syllabus that was given to me during training at the San Diego conference in 2014 by the American Academy of Forensic Psychology, specifically in the area of feigning and testing materials.**
03:01PM
Q. **Is this the same training that Doctor Brown testified that she attended?**
A. **Yes.**
Q. **And what is of significance regarding the materials from the syllabus in government's exhibit number 3, specific to that SIRS-2 testing?**
A. **There are several slides here -- and I'm trying to find the most relevant one.**

On page 90, which is midway through this paperwork, there's a little section here that shows that, in the SIRS-2 data set, that a large chunk of cases were eliminated.
03:02PM

Specifically, it says, "The SIRS-2 authors eliminated 112 cases from their sample as indeterminate. And they reported the FPR" which stands for false positive rate, "and TPR," true positive rate, "for only those cases they classified."

So, in other words, the author left out a large part of his sample and then he devised his classification tables of feigning and non-feigning, which are found on the other pages, based on incomplete data.

And this was what the presenter, Doctor Richard Frederick, wanted to bring to light, was that this presents some very serious problems in the validity and interpretation of the SIRS-2. And he essentially said, don't use it.

Q. And that was the same class that Doctor Brown attended?

03:03PM A. Yes, it was.

Q. And that was what you previously testified to, regarding your concerns of her use of this SIRS-2?

A. Exactly.

Q. Government's exhibit number 4.

If you could please take --

MS. VAN MARTER: And, Your Honor, the United States would move to admit government's 3.

THE COURT: Any objections to 3?

MR. SCHWEDA: No, Your Honor.

03:03PM THE COURT: Admitted.

BY MS. VAN MARTER:

Q. Government's number 4.

Doctor Low, what is that and how do you recognize that?

A. This is a paper by a forensic psychologist who has done

some presentations, Doctor DeClue, and it specifically talks about the same problems with the SIRS-2.

Q. And is there a specific page that you can -- is there some highlighted sections in this article that was provided as government's exhibit 4?

A. Yes.

The highlighted portions are mine. Give me one minute to find the relevant sections. Let's see. Page 10.

There's almost an entire paragraph at the bottom that I highlighted. And again, this author says, "In the SIRS-2 manual, incorrect numbers are provided for the FPR in specificity, in their table 4.2 on page 39.

In addition to being inaccurate in parts, the reported test utilities for the SIRS-2 classification are incomplete in at least two ways.

First, they ignore the fact that 120 of 522 protocols, 23 percent, were classified as indeterminate, that is, more protocols were classified as indeterminant than as feigned, and those classified as indeterminate were ignored in considering how accurate the SIRS-2 classification rules are."

03:04PM

03:05PM

Q. And when was -- is this a published article?

A. Yes.

And the publication date was 2011.

Q. And when was this continuing education that you and Doctor Brown both attended? What year?

A. **That was 2014.**

Q. **So, for the last five years, there has been information out there about the invalidity of the SIRS-2 test?**

A. **Yes.**

And, actually, if you turn to page 15, I highlighted one sentence there which I found to be very noteworthy.

And it says, "The SIRS-2 appears to be very vulnerable to challenges, regarding its admissibility in court."

Q. **And is that information that you would expect --**

03:05PM **THE COURT: Excuse me.**

The last paragraph says, "No wizardry is required to avoid this fate. All that's needed is for the developers of the SIRS-2 to develop and submit a manuscript regarding the SIRS-2 classification study that is sufficiently comprehensive to survive peer review for the publisher to allow independent professionals to analyze the data without impediment."

Go ahead.

BY MS. VAN MARTER:

Q. **So, is that information that you would expect an individual**

03:06PM **who is engaged on an average of four forensic evaluations, specific to competency, to be aware of?**

A. **Yes.**

Q. **And to also include in their report, if they are going to utilize that testing in any way?**

A. **Yes.**

Q. **And so, again, does that support your -- what, again, are your conclusions about Doctor Brown's opinion as to the SIRS-2 results in this particular case?**

A. **Well, again, I don't think it should have been used in the first place, so I would not even look at whatever results were obtained.**

Q. **We have gone over a couple of these issues before, but just to follow-up on that SIRS-2.**

You heard Doctor Brown's explanation of what that examination was, during her testimony?

03:07PM

A. **Yes.**

Q. **Did you find any issues with her explanation of even what the SIRS-2 was, faulty as it may be?**

A. **That's a hard question to answer.**

I don't know if -- I had problems following her explanation of the scales.

And, again, if anything, I would just emphasize that it's not an appropriate test to use, to begin with.

Q. **I want to just then take it back to her ultimate conclusions, Doctor Low.**

03:07PM

In this particular case, in terms of assessing competency, are you familiar with the federal statute?

A. **Yes, it's 18 USC 4241.**

Q. **And have you reviewed that statute regularly as a course of your duties and responsibilities in conducting these competency**

evaluations?
A. Yes.
Q. And are you familiar that there are differences between the federal competency statute and some state competency statutes?
A. Yes.
Q. And is that significant to know before you begin a competency evaluation?
A. Very much so.
Q. Why?
03:08PM A. Because they can differ vastly, depending upon what state you're working within.
Q. And --
A. So you need to be able to answer the question for the appropriate courts that you're working for.
Q. Was it of significance to you that Doctor Brown was unfamiliar with the federal statute and had never read it?
A. Yes, I found that very alarming.
Q. Why?
A. Because anybody who is doing this sort of work, and saying
03:08PM that they're an expert in the field of criminal forensic psychology, needs to know, as the basic ground work, what statute they're working for, working with, and what the definition of competency is for that particular state or jurisdiction.
Q. And Doctor Brown's admitted unfamiliarity with the federal

statute itself, does that somewhat explain her inconsistent conclusions, in terms of competency with respect to Doctor Burke (sic)?

A. It could.

Q. And in some of her explanation she discussed a webinar.

A. Yes.

Q. Are you familiar with this webinar?

A. No.

Q. And have you recently attended updated continuing education, specifically with respect to competency evaluations in that area of forensic psychology?

A. Yes, just last month.

Q. And approximately how many days was that?

A. I attended four days' worth of conferences.

Q. And in those four days, was this webinar ever mentioned, in terms of a new piece of study or new information to be aware of in impacting the competency evaluations?

A. No.

Q. And if it were a significant or an accepted area of study, would you expect it to be included in this most recent continuing education?

A. Yes.

And not only that, I would have expected other colleagues to have brought that to my attention.

Q. And have you heard of this webinar?

A. **No.**
Q. **And in all of your years of experience, and in all the continuing education, have you ever seen a bifurcated opinion such as Doctor Brown's, with respect to federal competency?**
A. **No.**
Q. **And in your assessment of Mr. Burke's competency, again with respect to the supervised release, you're looking to, again, assess what of his understanding of the supervised release violation?**
03:10PM A. **Correct.**
MS. VAN MARTER: Your Honor, if I could have a moment?
(Pause.)
MS. VAN MARTER: Thank you, Doctor Low.
I have no other questions, Your Honor.
THE COURT: Mr. Schweda.

CROSS-EXAMINATION

BY MR. SCHWEDA:
03:10PM Q. **You haven't requested Doctor Brown's raw data, have you?**
A. **No.**
Q. **The -- do you know what the Dusky standard is?**
A. **I'm somewhat familiar with it, yes.**
I believe it's what's used in the state.
Q. **Dusky is the name of a Supreme Court case?**

A. **Yes.**
Q. **Do --**
THE COURT: Spell it, please.
MR. SCHWEDA: Pardon?
THE COURT: Spell it.
MR. SCHWEDA: D U S K Y.
THE COURT: Okay.
BY MR. SCHWEDA:
Q. **And --**
03:11PM **THE COURT: You mean a state Supreme Court case.**
MR. SCHWEDA: United States.
THE COURT: United States, okay.
MR. SCHWEDA: Supreme Court.
And, in fact, we cited it in our very short submittal for this hearing, Your Honor.
BY MR. SCHWEDA:
Q. **Do you, did you know that 4142 is modeled after the Dusky case?**
A. **Yes.**
03:11PM Q. **And so you wouldn't expect there to be any differences between the standards, if Dusky is just putting into code what the Dusky standard is, correct?**
A. **There's slight differences.**
Q. **What are they?**
A. **Well, I believe, in the Dusky case, it refers to a**

defendant having a rational and factual understanding of the charges against them, so forth.

In the federal statutes, it doesn't separate out, separate it out into rational and factual understanding, it just asks about whether or not the defendant's suffering from a mental disease or defect, rendering them mentally incompetent, to the extent that they're unable to understand the nature and consequences of the court proceedings, or to assist properly in the defense.

03:12PM Q. So the Dusky standard has more then, according to your testimony?

A. A little bit more, yes.

Q. And if that's still the law of the land, the Court would be bound to follow it, correct?

A. That's part of, again, the Washington state statutes and what they use for competency.

Q. I'm not -- I didn't bring up anything about the Washington state standard.

A. Then I'm afraid I'm not understanding your question.

03:12PM Q. Dusky is a United States Supreme Court case.

A. Yes.

Q. Is the SIRS-2 still published?

A. Unfortunately, yes.

Q. Do you know if the, if there has been any further peer review of the test?

A. I don't know. I do know that the author, Doctor Rogers, as well as the publisher of the SIRS-2, have been approached by psychologists and have been asked to produce this data that's missing, and they have refused to do so.
Q. Okay.
But you don't know when that was.
A. I don't know when that was, no.
Q. Okay.
MR. SCHWEDA: I have no further questions.
03:13PM THE COURT: Anything else, Miss Van Marter?
MS. VAN MARTER: No, Your Honor.
THE DEPUTY CLERK: Miss Van Marter, were you, did you move to admit number 4? Or you never --
MS. VAN MARTER: Yes.
THE DEPUTY CLERK: I'm sorry, you did not move to admit it. Would you like to?
MS. VAN MARTER: I intended to move to admit government 4, Your Honor.
THE COURT: So 3 and 4.
03:13PM MS. VAN MARTER: 3 and 4.
THE COURT: So what exhibits do you show as having been admitted?
MS. VAN MARTER: From the United States is 1, 2, 3, 4, 6 -- 1, 3, 4 -- 1, 2, 3, 4, and 6.
MR. SCHWEDA: And, Your Honor, if, I know that 7 and

13 have. If 1 hasn't, we would ask that 1 be admitted, because Doctor Low was questioned about that and she --

THE COURT: What is it?

MR. SCHWEDA: It's the 1999 Sacred Heart discharge summary of Mr. Burke.

THE COURT: And that's your number 1 or their number 1?

MR. SCHWEDA: 101, excuse me.

THE COURT: 101?

03:14PM MR. SCHWEDA: Yes.

THE COURT: Any objections?

MS. VAN MARTER: No, Your Honor.

THE COURT: 101 is admitted.

So, what do you show for exhibits from you?

MR. SCHWEDA: Just 1, 7, and 13, Your Honor. Or 1, 101, 107, and 113.

THE COURT: Okay. There we are.

How do you want to handle final argument? Because I'm leaving, at this point.

03:14PM So, I've gone beyond the time, my staff and I haven't eaten since 8 o'clock this morning, so we're done.

How do you want to handle final argument?

MR. SCHWEDA: May I suggest that we do it by video conference from the, from the courtroom to Your Honor.

THE COURT: I'm happy to an accommodate you, if I can.

My schedule is quite full.

I'm here on Monday, but have no time, because I'm in mediations all day.

And then on Tuesday I have a full docket.

Thursday I have a full docket.

And it might be that we could squeeze you in -- I'm sorry, Doctor Low, you may step down. Thank you.

MS. VAN MARTER: Thank you, Doctor Low.

THE COURT: We might be able to squeeze you in on Wednesday, I don't know.

03:15PM

Miss Vargas?

THE DEPUTY CLERK: Yes, you have a video conference hearing at 11 on Wednesday.

And other than that, you don't have anything else and the courtroom is open.

THE COURT: So we can accommodate you Wednesday.

What's your pleasure? What time?

MR. SCHWEDA: What time -- does the Court have a suggested time?

03:15PM

THE COURT: I have an 11:00 o'clock by video from Spokane.

THE DEPUTY CLERK: About 1:30. And then you have the afternoon --

THE COURT: 1:30? 1:30? Yes or no?

MR. SCHWEDA: As far as I know, yes, Your Honor. I

don't really have anything on.

THE COURT: Counsel, I can assure you that I have very limited time --

MR. SCHWEDA: Okay.

THE COURT: -- on this matter or, or to squeeze other things in.

So it's 1:30, next Wednesday, by video conference. And we'll hear from you at that time.

MS. VAN MARTER: Your Honor, just for the record, we're, we were happy to defer to the Court, for the Court's ultimate determination and waive final argument, but...

03:15PM

THE COURT: I think it might be helpful for -- I think it's very important for Mr. Schweda and his client to have final argument, so...

MS. VAN MARTER: Yes, Your Honor.

THE COURT: Don't you agree?

MR. SCHWEDA: Yes, Your Honor.

THE COURT: Yeah.

So that said, we have a hearing next week. And,

03:16PM

Mr. Schweda, you have your marching orders on when you're going to submit written materials about the release of this material to the Snohomish County prosecutor and Western State Hospital.

I've indicated to you that it seems rational to me that that occur, albeit under seal, but I'll look forward to receiving your briefing on the issue.

And then we're prepared to be here next week and begin at nine o'clock in the morning for, on the assumption, tentatively scheduled, that there's a ruling that there's competency and we're facing the violation.

To me, it's clear that we're going ahead on the 19th, because Doctor Brown concedes that, at the very least, as far as absconding, he's competent.

And my determination will be as to the full ambit, full scope of the violations of failure to, prohibition for commission of another crime; and that would implicate the charges that were dismissed without prejudice in Snohomish County.

So, we are going ahead next Friday at nine and I'll make rulings in between. So, I think we're good to go.

Anything else? No? Thank you.

Court's adjourned.

MS. VAN MARTER: No, Your Honor.

THE COURT: You may go about your business.

(Whereupon Court was recessed at 3:16 p.m.)

03:17PM

STATE OF WASHINGTON)

: Reporter's Certificate

COUNTY OF SPOKANE)

I, Mark A. Snover, a Registered Professional Reporter and Official United States District Court Reporter;

DO HEREBY CERTIFY:

That the foregoing transcript contains a true and accurate transcription of my shorthand notes of all requested matters held in the foregoing captioned case.

Further, that the transcript was prepared by me or under my direction.

DATED this 12th day of December , 2016.

/s/ Mark A. Snover

MARK A. SNOVER, RPR, CSR

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